

34
TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1913~~ 1914

No. ~~100~~ 82

AARON SAGE, PLAINTIFF IN ERROR,

vs.

GEORGE HAMPE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED DECEMBER 24, 1912.

(23,472)

(23,472)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 405.

AARON SAGE, PLAINTIFF IN ERROR,

vs.

GEORGE HAMPE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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1 In the Supreme Court of the State of Kansas.

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Be it remembered, that on the 16th day of January A. D. 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, a notice of appeal with acknowledgement of service and a transcript of the judgment in the above entitled cause, which notice of appeal and transcript of judgment *is* in the words and figures as follows, to-wit:

2 No. 17478.

Filed Jan. 16, 1911. D. A. Valentine, Clerk Supreme Court.

In the District Court of Shawnee County, Kansas.

No. 24660.

GEORGE HAMPE, Plaintiff,

vs.

AARON SAGE, Defendant.

To said plaintiff, George Hampe, and to J. B. Larimer and A. M. Harvey, his attorneys:

You are hereby notified that the defendant, Aaron Sage, appeals from the verdict and judgment of the court herein entered December 2nd, 1910, from the order over-ruling defendant's motion for judgment and defendant's motion for a new trial, herein entered December 24th, 1910, to the Supreme Court of the State of Kansas.

EDWIN A. AUSTIN,
Attorney for Defendant.

Service of above and foregoing notice acknowledged this 29 day of December, 1910.

J. B. LARIMER,
A. M. HARVEY,
Attorneys for Plaintiff.

Endorsements: No. 24660. George Hampe vs. Aaron Sage, Filed Dec. 29, 1910, R. L. Thomas, Clerk District Court.

Notice of Appeal.

Whereas, be it remembered, That on the 2nd day of December A. D. 1910, in the Shawnee County District Court, Third Judicial

District, State of Kansas, before the Hon. A. W. Dana, presiding Judge, it being at the September, 1910, Term of said Court, the following proceedings, among others, were had, to-wit:

No. 24660.

GEORGE HAMPE, Plaintiff,
vs.
AARON SAGE, Defendant.

Now on this 2nd day of December, 1910, at nine o'clock A. M., pursuant to said adjournment, trial of this cause was resumed, and the plaintiff rested his case, and thereupon the defendant introduced evidence in support of his defense herein and rested. And thereupon the Court being fully advised, instructed the jury in writing, and thereupon arguments were made by counsel for plaintiff and defendant, respectively, and the jury being duly cautioned by the Court, retired to the jury room in charge of the sworn bailiff of this court to consider their verdict, and thereupon, and on said second day of December, 1910, the jury having agreed upon their verdict, returned the same into open court, together with the special questions and answers submitted to them in writing, said questions and answers thereto, omitting the caption thereof, being in words and figures as follows, to-wit:

THE STATE OF KANSAS,
Shawnee County, ss:

In the District Court, Third Judicial District.

No. 24660.

GEORGE HAMPE, Plaintiff,
vs.
AARON SAGE, Defendant.

Verdict.

We, the jury empaneled and sworn in the above entitled case, do, upon our oaths, find for the plaintiff and assess his damage at \$2,647 66/100.

J. C. COPPER, *Foreman.*

4 *Special Questions Submitted to the Jury by the Defendant.*

Question 1. Was the Oklahoma land described in plaintiff's petition, at the date of the execution of the agreement sued on in this action, August 20th, 1907, Indian land allotted and patented to members of the tribe of Pottawatomie Indians and not to this defendant, under patents which provide that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom

such allotment shall have been made and which period had not then expired or otherwise terminated?

Answer. —.

Ruled out by the court and excepted to.

Question No. 2. Had the United States made any patent or conveyance of the Oklahoma land described in the plaintiff's petition at the date of the execution of the agreement sued on in the action August 20th, 1907, other than the trust patents referred to in Question No. 1?

Answer. —.

Ruled out by the Court and excepted to.

Question No. 3. Was the defendant at the date of the execution of the agreement sued on in the action August 20th, 1907, the owner of the Oklahoma land described in the plaintiff's petition?

Answer. —.

Ruled out by the court and excepted to.

Question No. 4. Did the plaintiff know at the date of the execution of the agreements sued on in this action August 20th, 1907, that the Oklahoma land described in the plaintiff's petition was Indian land allotted and patented by trust patents to members of the tribe of Pottawatomie Indians and not to the defendant?

Answer. —.

Ruled out by Court and excepted to.

Question No. 5. What was the fair market value of the Oklahoma land described in the plaintiff's petition on August 20th, 1907?

Answer. \$13,680.00.

Question No. 6. What was the fair market value of the Oklahoma land described in the plaintiff's petition in October, 1907?

Answer. \$13,680.00.

5 Question No. 7. What was the fair market value of the Shawnee County land described in the plaintiff's petition on August 20th, 1907?

Answer. \$9,291.00.

Question No. 8. What was the fair market value of the Shawnee County land described in the plaintiff's petition in October, 1907?

Answer. \$9,291.00.

J. C. COOPER, *Foreman.*

And thereupon the Court received said verdict and approved the same, together with the answers to said special questions, and it is considered, ordered, and adjudged that the plaintiff do have and recover of and from the defendant the sum of Twenty-six Hundred Forty-seven Dollars and Sixty-six Cents, (\$2,647.66), together with all the costs of this action, taxed at \$—. And hereof let execution issue; to which verdict, judgment, order and decision of the Court the said defendant at the time duly excepted and still accepts.

A. W. DANA, *Judge.*

O. K.

E. A. AUSTIN.

— HARVEY.

6 Whereas, be it remembered, That on the 24th day of December, A. D. 1910, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Hon. A. W. Dana, presiding Judge, it being at the September, 1910, Term of said Court, the following proceedings, among others, were had, to-wit:

No. 24660.

GEORGE HAMPE, Plaintiff,

vs.

AARON SAGE, Defendant.

Now on this 24th day of December, 1910, come the parties hereto by their respective attorneys, and thereupon this cause comes on for hearing before the Court on the motion of the defendant for a new trial, which motion was heretofore presented to the Court, argued by counsel and taken under advisement by the Court, and the Court now being fully advised in the premises, doth over-rule the said motion, to which ruling of the Court over-ruling and denying said motion the said defendant excepts.

A. W. DANA, Judge.

7 Whereas, be it remembered, That on the 24th day of December, A. D. 1910, in the Shawnee County District Court, Third Judicial District, State of Kansas, before the Hon. A. W. Dana, presiding Judge, it being at the September, 1910 Term of said Court, the following proceedings, among others, were had, to-wit:

No. 24660.

GEORGE HAMPE, Plaintiff,

vs.

AARON SAGE, Defendant.

Now on this 24th day of December, 1910, come the parties hereto by their respective attorneys, and thereupon this cause comes on for hearing before the Court on the motion of defendant for judgment non obstante verdicto, which motion was heretofore presented to the Court, argued by counsel and taken under advisement by the Court, and the Court now being fully advised in the premises, doth over-rule the said motion, to which ruling of the Court over-ruling and denying said motion the said defendant excepts.

A. W. DANA, Judge.

Certificate.

STATE OF KANSAS,
Shawnee County, ss:

I, R. L. Thomas, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a full, true and correct copy of Notice of Appeal, Ac-

knowledge of Service of Notice of Appeal, Journal Entry of Judgment, Order over-ruling Motion for New Trial and Order over-ruling Motion for Judgment, in the above entitled cause, as the same appears On file and of record in my office.

Witness my hand and the seal of said court, hereunto affixed at my office in the city of Topeka, this 14th day of January, A. D. 1911.

[SEAL.]

R. L. THOMAS, *Clerk*,

By _____,
Deputy Clerk.

(Endorsed:) 17478. George Hampe v. Aaron Sage. Notice of Appeal & Transcript. Filed Jan. 16, 1911. D. A. Valentine, Clerk Supreme Court.

8 Be it further remembered, that afterward on the 25th day of February A. D. 1911, there was filed in the office of the clerk of the supreme court of the state of Kansas, an abstract of the record, which abstract of the record together with acknowledgement of service of the same is in the words and figures, as follows, to-wit:

9 Filed Feb. 25, 1911. D. A. Valentine, Clerk Supreme Court.

No. 16583.

In the Supreme Court of Kansas.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Abstract of Record.

Edwin A. Austin, C. E. Carroll, Attorneys for Defendant.

Service of within abstract acknowledged this 25 day of February 1911.

J. B. LARIMER.

Att'y for Appellee.

10 In the Supreme Court of Kansas.

No. 16583.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Abstract of Record.

This case was tried December 2, 1910, on the second amended and supplemental petition of the appellee which was held to be insuffi-

cient on a prior appeal in Case No. 16583 reported in 82 Kansas 728, as amended by interlineation after the mandate of this court was received below.

The amendment consisted of the words in black-faced type on page 3 of this abstract. The second amended and supplemental petition, as so amended, reads as follows: (Omitting caption and signatures.)

"Comes now the plaintiff and by leave of court, files this his second amended and supplemental petition herein, and for his cause of action against said defendant, says:

That on and prior to the 20th day of August, 1907, said plaintiff was the owner in fee simple of a certain tract of land situated in

Shawnee county, Kansas, described as follows: All that part
11 of the Southeast quarter (S. E. $\frac{1}{4}$), of Section Eleven (11), Township Twelve (12), South of Range Fifteen (15), East of the Sixth P. M., lying south of Shunganunga creek, which said tract of land contains something more than Eighty-one and one-half ($81\frac{1}{2}$) acres, and subject only to a recorded mortgage thereon of \$2,500.00, which said land was shown to defendant and examined by him shortly prior to August 20th, 1907.

Plaintiff further alleges that thereafter and on or about the 20th day of August, 1907, the said defendant, Aaron Sage, contracted and agreed in writing with the said plaintiff, to purchase said above-described tract of land from the plaintiff, at and for the agreed sum and price of \$13,040.00, and at the same time, and in the same contract, the said defendant agreed to sell and convey to the plaintiff a certain tract of land which was shown to plaintiff by defendant, containing 760 acres, located in Pottawatomie county, Oklahoma, at and for the agreed sum and price of \$15,200.00, upon which said last mentioned tract of land the said defendant agreed to take back from the said plaintiff a mortgage for \$6,000.00, bearing interest at the rate of five per cent. per annum, and it further agreed that said plaintiff was charged with the interest of said mortgage of \$2,500.00 on his said land in Shawnee county, Kansas, to the first day of January, 1908; and it was by said parties further agreed, at the time, that the said defendant would pay to the said plaintiff the sum of \$1,228.00 in cash, being the balance due him under said contract. Plaintiff hereto attaches a full, true, and correct copy of said written contract executed by the plaintiff and the defendant on or about
12 the 20th day of August, 1907, marked Exhibit 'A', and made a part hereof."

The description of said tract of land containing 760 acres located in Pottawatomie county, Oklahoma, hereinbefore, and in the said written contract between plaintiff and defendant, dated August 20, 1907, referred to, which land was shown to plaintiff by defendant a short time prior to the execution of said written contract by plaintiff and defendant, is as follows:

"The N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, all in Sec. 21; also, the S. $\frac{1}{2}$ of Sec. 22, and the N. W. $\frac{1}{4}$ of Sec. 27, all in Twp. 7 N., R. 3 E., in the County of Pottawatomie and State of Oklahoma. Amendment. Said tract of

land was the only land in Pottawatomie county, Oklahoma, which said defendant then owned or claimed to own or have dominion over or control of or in which he had or claimed to have any interest.

"Plaintiff further alleges that the said defendant has neglected and refused to comply with and perform the said contract on his part, or any part thereof; that plaintiff has fully performed said contract on his part, and has at all times been ready, able and willing to comply with, and perform, the said contract in all respects, and has at all times so advised and informed said defendant; and said plaintiff now brings into court and tenders to the said defendant a general warranty deed and perfect abstract of title, subject only to said mortgage of

13 \$2,500.00, for his said land in Shawnee county, Kansas, being the only tract of farm land that said plaintiff owns or did own, in said county, on said 20th day of August, 1907, and the same land that was shown to, and examined by, said defendant, prior to the making of said contract, upon payment by defendants to him of said agreed purchase price for his said land.

"That notwithstanding his obligation under the foregoing contract and in violation thereof, the said defendant, since this action was commenced, without the knowledge or consent of plaintiff, has conveyed or caused to be conveyed to some person other than this plaintiff, all of the aforesaid real estate in Pottawatomie county, Oklahoma that the said 760 acres of land in Pottawatomie county, Oklahoma, which the said defendant in and by said agreement, sold and agreed to convey to said plaintiff as aforesaid, was then and ever since has been and is now of the actual value of Twenty-five (\$25.00) Dollars per acre, and that plaintiff, with due diligence, has been unable to sell his said land in Shawnee county, Kansas, for more than the sum of One Hundred Twenty-five (\$125.00) Dollars per acre, and that plaintiff, in good faith, relying upon the performance of said contract by said defendant on his part, and for the purpose of performing the same and removing from Shawnee county, Kansas, to Pottawatomie county, Oklahoma, in furtherance of said contract, with the knowledge of said defendant, advertised and sold all of the personal property belonging to plaintiff on his said farm in Shawnee county, Kansas, at public auction, prior to the commencement of this action, and

14 was unable to realize and did not realize at said sale for his said personal property consisting of loose lumber, posts, farming utensils, feed and other personal property on said farm, the sum of \$1,000.00 less than the real and fair market value thereof, whereby and because of the foregoing matters, the plaintiff has been damaged in the sum of Seven Thousand Six Hundred Fifty-two Dollars and fifty cents (\$7,652.50), being Two Thousand Eight Hundred and Fifty-two Dollars and fifty cents (\$2,852.50), the difference between the contract price agreed to be paid by defendant to plaintiff for his said land in Shawnee county, Kansas, and the amount that plaintiff has been able to find a purchaser therefor, the further sum of Three Thousand Eight Hundred (\$3,800.00) Dollars, being the difference between the contract price that defendant agreed to sell plaintiff said 760 acres of land in Pottawatomie county, Oklahoma, and the actual market value thereof, and the sum of

\$1,000.00 damages sustained by plaintiff by reason of selling his personal property at a loss in the performance on his part of said contract, with the knowledge of said defendant as aforesaid, by reason of which plaintiff demands judgment against defendant for the said sum of \$7,652.50 with interest thereon from the date of the commencement of this action.

"Wherefore, plaintiff prays judgment against the defendant for the sum of \$7,652.50 with interest thereon from the 16th day of October, 1908, at the rate of six per cent. per annum, and for costs of this action."

EXHIBIT "A."

AUGUST 20TH, 1907.

This is to certify, that on the above date, this contract made between Aaron Sage, party of the first part, and Geo. Hampe, party of the second part. Party of the first part agrees to take twenty dollars per acre for (760) seven hundred and sixty acres located in Pottawatomie county, Oklahoma, which amounts to Fifteen Thousand Two Hundred (\$15,200.00) Dollars. Party of the first party further agrees to take back a mortgage of six thousand dollars at five per cent. per annum. Party of the second part agrees to take (\$160.00) One Hundred and Sixty Dollars per acre for 81½ acres located in Shawnee county, Kansas, which amounts to Thirteen Thousand and Forty Dollars (\$13,040.00). Said party of second part further agrees to give said party of the first part a first mortgage of (\$6,000.00) Six Thousand Dollars, with interest at five per cent. per annum on said land located in Pottawatomie county, Oklahoma, these figures are thus in full:

Party of the first part.....	\$15,200
Party of second part.....	13,040
	<hr/>
Balance due Aaron Sage.....	\$2,160
First mortgage on Hampe land.....	2,500
	<hr/>
	\$4,660
Interest on mortgage to January 1st, 1908.....	112
	<hr/>
	\$4,772
	<hr/>
Amount of mortgage.....	\$6,000
Amount of mortgage and interest and difference.....	4,772
	<hr/>
To be cash from Sage to Hampe.....	\$1,228

Witness this 20th day of August, 1907.

AARON SAGE.
GEO. HAMPE.

16 The appellant's answer thereto was as follows: (Omitting caption and signatures.)

Comes now said defendant, Aaron Sage, and for his answer to plaintiff's second amended and supplemental petition as amended, said defendant says that he denies each and every allegation and averment in said second amended and supplemental petition as amended contained.

Second. And for a second answer to said amended and supplemental petition as amended, said defendant further says—that the land described in said second amended and supplemental petition as amended, as situated in Pottawatomie county, Oklahoma, was at the time of the execution of said alleged contract, as said plaintiff then well knew, Indian land allotted and patented to members of the Tribe of Pottawatomie Indians and not to this defendant under the provisions of the act of Congress approved February 8th, 1887, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territory over the Indians and for other purposes, copies of which patents are hereto attached marked Exhibit "A," "B," "C," "D," "E" and "F," and made a part hereof and in and by said act of Congress it is provided that any conveyance or contract made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents and said act of Congress, shall be absolutely null and void and defendant says that said period of twenty-five years from the date of said allotment and trust patent had not expired and had
17 not been abrogated at the date of the alleged contract set out in a part of plaintiff's second amended and supplemental petition as amended.

Third. And for a third answer to said second amended and supplemental petition as amended said defendant further says that he specially denies that he contracted or agreed orally or in writing with said plaintiff to purchase the tract of land described in said second amended and supplemental petition as amended, situated in Shawnee county, Kansas, from the plaintiff, at the sum of \$13,040.00 or for any other sum, and he further specially denies that he contracted or agreed to sell or convey to plaintiff the land described in said second amended and supplemental petition as amended, in Pottawatomie county, Oklahoma, for the sum of \$15,200.00 or for any other sum, or at all. That orally said plaintiff offered to take \$160.00 per acre for eighty-one and one-half acres in Shawnee county, Kansas, but that said defendant did not accept said offer and said offer still remains unaccepted.

That this defendant orally offered to take Twenty (\$20.00) Dollars per acre for 760 acres of land in Pottawatomie county, Oklahoma, but that said plaintiff has never accepted said offer or offered to pay therefor, and no time for the payment of said price or any deferred portion thereof was proposed or accepted or agreed upon by either party; that said oral offers on the part of the plaintiff and defendant it was then agreed would not stand as a complete and certain contract for the trade or exchange of lands for each other,

18 but only as mutual proposals as to the basis of a contract which might be thereafter entered into or not, as the parties thereto might determine after the land of plaintiff had been further examined and by the defendant, this defendant's wife and son and daughter, and especially reserved his right to accept or reject said proposals until said examination. That said written agreement set out as a part of plaintiff's second amended and supplemental petition as amended was reduced to writing by one E. H. Hewins, who through ignorance, design or mistake omitted therefrom the agreement that the same was not to stand as a complete and certain contract for the trade or exchange of lands but only as mutual proposals, as the basis of a contract which might be thereafter entered into or not as the parties might determine after the land of the plaintiff had been further examined by said defendant and said defendant's wife and son and daughter, and that each of said parties thereto reserved the right to accept or reject said proposals until after said examinations and this defendant was induced to execute the same by the false and fraudulent representations of said plaintiff and said Hewins, that the said omissions were immaterial, which representations this defendant at the time relied upon. That the said proposals on the part of said plaintiff after said further examination, were rejected by said defendant and have never been accepted by the defendant, and this defendant has never agreed to nor executed any contract to purchase the plaintiff's said land in Shawnee county, Kansas, nor to sell or convey the 760 acres of land in Pottawatomie county, Oklahoma, described in plaintiff's second amended and supplemental petition as amended, or any other

19 760 acres in that county to the plaintiff, or to trade or exchange the same for plaintiff's said land in pursuance of said proposals or otherwise.

Fourth. And for a fourth answer to the plaintiff's second amended and supplemental petition as amended, said defendant further answering and referring to and making a part of this answer, the second and third counts, paragraphs and answers herein, says: that the agreement of this defendant to purchase said lands of the said George Hampe situated in Shawnee county, Kansas, or to sell and convey to said George Hampe said 760 acres of land situated in Pottawatomie county, Oklahoma, alleged in said second amended and supplemental petition, which agreement this defendant denies, is void, and in violation of the provisions of the Statute of Frauds of the State of Kansas, and no action can be brought or maintained to charge this defendant thereon, and that the agreement and memorandum thereof set up and made a part of plaintiff's amended petition as "Exhibit A" thereof is insufficient under the provisions of the Statute of Frauds of the State of Kansas to sustain an action to charge the defendant with an agreement to purchase the lands of the plaintiff situated in Shawnee county, Kansas, described in the said second amended and supplemental petition as amended, and insufficient under the provisions of the Statute of Frauds of the State of Kansas to sustain an action to charge the defendant with an agreement to sell and convey to plaintiff the 760 acres of land situ-

ated in Pottawatomie county, Oklahoma, described in the said second amended and supplemental petition as amended.

20 The six patents attached to the answer as Exhibits "A," "B," "C," "D," "E" and "F" were of:

1. The Southwest quarter of the Southwest quarter of Section 22, and the Southeast quarter of the Southeast quarter of Section 21, Township 7, North of Range 3 East, to Clark H. Sage.

2. The South half of the Northeast quarter, the Northwest quarter of the Northeast quarter and the Northeast quarter of the Northwest quarter of Section 21, Township 7, North of Range 3 East, to George J. Sage.

3. The North half of the Southeast quarter of Section 21, Township 7, North of Range 3 East, to Minnie Sage.

4. The Northwest quarter of Section 27, Township 7, North of Range 3 East, to Oliver Martelle.

5. The North half of the Southwest quarter and the Southeast quarter of the Southwest quarter of Section 22, Township 7, North of Range 3 East, to Fred-John-Sage.

6. The Southeast quarter of Section 22, Township 7, North of Range 3 East, to Eliza Sage.

And each, omitting the testimonium clauses and signatures naming the different allottees and different tracts, read as follows:

"The United States of America to all whom these presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States, a schedule of allotment of land dated Sept. 15,

21 1891, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior, Sept. 16th, 1891, whereby it appears that under the provisions of the Act of Congress approved February 8, 1887 (24 Stat. 388), as amended by the Act of Congress of March 3, 1891 (26 Stat. 1019), Clark H. Sage—an Indian of the Citizen Pottawatomie tribe or band has been allotted the following described land: The Southwest quarter of the Southwest quarter of Section 22, and the Southeast quarter of the Southeast quarter of Section 21, Town. 7, N. of Range 3 East, the Indian Meridian, Oklahoma Territory, containing eighty acres. Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act c. Congress of February 8, 1887, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions in said fifth section) for the period of twenty-five years in trust for the sole use and benefit of the said Clark H. Sage, or in case of his decease, for the sole use of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period."

These patents were dated Jan. 19, 1892.

Appellee's reply was an unverified general denial.

On the trial, besides testimony of various witnesses as to the value of the land described in the petition as situated in Shawnee county, Kansas, and in Pottawatomie county, Oklahoma, the plaintiff
22 *and Plaintiff* testified that he was the owner of the land described in the petition as belonging to him and situated in Shawnee county, Kansas, and that he owned no other land in said county at the time of the execution of the contract as set up in the petition, and that at the time of the making of the contract, as set up in the petition, said land was vested in him free and clear and unincumbered, except a mortgage for \$2,500.00, and that this was the same land that was shown and examined by the said defendant prior to the execution of the said contract; and that the title to the said land in Shawnee county remained in plaintiff as above stated until the time of the commencement of this action.

The plaintiff examined as a witness in his favor Thomas G. Shillinglaw, who, over the objection of the defendant to each question and statement, that the same was incompetent, irrelevant and immaterial and an attempt to prove by parol a contract which is required by the Statute of Fraud to be in writing, which was overruled, the defendant excepting, testified that he was a resident of the City of Topeka, Kansas, and engaged in the real estate business, making a specialty of the sale of farms and farm lands, and that a short time prior to the execution of the contract set up in the petition the defendant, Aaron Sage, called at his place of business and listed the lands described in the petition as being situated in Pottawatomie county, Oklahoma, as being for sale, and then and at that time stated that he owned said lands and did not own any other land in said Pottawatomie county, Oklahoma, and that the reason he wanted to sell it was that it was all the land he did own in said county and that he intended to get rid of it and get some nearer home, and that said lands were listed for sale with the witness as the property of the defendant and to be sold at \$20.00 per acre, and that said lands were still listed with him as above stated at the time of the execution of the contract as set up in the petition.

Also, George W. Moffitt, who, over the same objection, testified
23 that he was a resident of the City of Topeka, Kansas, and a real estate dealer, and as such interested in business with witness, Shillinglaw; that just prior to the time of the execution of the contract as set up in the petition the defendant told him that he, the defendant, had for sale the lands described in the petition as situated in Pottawatomie county, Oklahoma, and was desirous of selling them at the price listed with witness, Shillinglaw, or of trading them for lands in Shawnee county, Kansas, and that the said lands were listed with witness, Shillinglaw, and this witness, as the property of the defendant, and remained so listed until the time of the execution of the contract as set up in the petition. Witness, Shillinglaw, and Moffitt both testified that the entries in their books showing the said lands to be listed as the property of the defendant was shown to the defendant, and that he had full knowledge of what such entries contained. The original entries from the

books of witness, Shillinglaw, and Moffitt, and identified by them, were introduced in evidence over objection of defendant, and in substance they consisted of a description of the lands described in the petition and situated in Pottawatomie county, Oklahoma, in the same manner that it is described in the petition and gave the price desired as \$20.00 per acre, and the owner as Aaron Sage.

E. H. Hewins, over the same objection, also testified that at the time of the conversation mentioned on page 13, and repeatedly and several times while on the trip to Pottawatomie county, Oklahoma, and returning therefrom, the defendant stated to him that he owned and had for sale the lands described in the petition as situated in Pottawatomie county, Oklahoma, and that he had no other lands in the said county; that he was anxious to dispose of the said lands in Pottawatomie county, Oklahoma, because they were the only lands that he had there and he wanted to get his landed property together near home. The plaintiff also testified over the same objection that the same statements were made by the defendant in the conversations at which he was present.

Also, the plaintiff and E. H. Hewins, a witness for plaintiff, over the proper objection of the defendant to each question and statement, that the same was incompetent, irrelevant and immaterial and an attempt to prove by parol a contract which is required by the Statute of Fraud to be in writing, which was overruled, the defendant excepting, testified to a conversation at the farm of plaintiff about three or four weeks before the execution of the written agreement, "Exhibit A" of the petition, in which the defendant stated to them that he and his family had 760 acres of land, part allotted and part deeded, in Pottawatomie county they wanted to exchange for a smaller tract; that it was Indian land and that they did not have a patent to it but he said he would get it; that it was the only land he owned or was interested in in Pottawatomie county, Oklahoma. That it was then agreed that the plaintiff, defendant and Hewins, were to go down there on the next land excursion day, but plaintiff's mother being sick, plaintiff did not go with them. That defendant showed Hewins the land described in the petition as situated in Pottawatomie county, Oklahoma, as the land he was talking about. Plaintiff went down a week later, without having seen Sage in the meantime, or his knowing plaintiff was going down. He said that by defendant's direction he went to livery men who were to take him out, and one of them did so, and he stayed to dinner with the tenant. The land they showed him was the land described in the petition and the land that the defendant described to plaintiff in their conversations.

He also testified that he executed, acknowledged and tendered to the defendant a warranty deed of the Shawnee county land described in the petition before the commencement of the suit, and defendant refused to accept it. He testified he knew defendant would refuse or that he had refused to carry out the trade before the sale of his personal property, and the court excluded all evidence of damage by reason of such sale. The plaintiff offered no evidence and no evidence was introduced by either party, beyond the statements and representations contained in the

above conversation, establishing, or tending to establish, that the defendant owned or controlled or had any interest in any of the land described in the petition as situated in Pottawatomie county, Oklahoma.

The plaintiff offered no evidence, and no evidence was introduced by either party concerning the conversation or transaction had at the time of the execution of the written agreement, "Exhibit A" of the petition, nor of the land then intended to be referred to by the words used in that agreement, nor that the land then intended to be referred to by the words used in that agreement was the land referred to in the earlier conversation, and examined by Hewins and Hampe.

This was the substance of all the evidence of the plaintiff.

At the close of the plaintiff's evidence the defendant demurred to the evidence of the plaintiff for the reason that the same does not prove facts sufficient to constitute a cause of action in favor of said plaintiff against said defendant, which demurrer the court overruled, the defendant at the time excepting.

AARON SAGE, the defendant, called as a witness on his own behalf, being first duly sworn, testified as follows:

26 Direct examination.

Questions by Mr. AUSTIN:

Q. State your name to the court and jury?

A. Aaron Sage.

Q. Where do you live?

A. I live near Dover, Wabaunsee county.

Q. Are you defendant in this action?

A. Yes, sir.

Q. Are you acquainted with the tract of land described in the petition in this case as situated in Pottawatomie county, Oklahoma?

A. Yes, sir.

Q. How long have you been acquainted with it?

A. Ever since it was allotted.

Q. About when was that?

A. Well, sir; I can't tell you? I forget; several years ago.

Q. Wasn't it as long ago—was it in the year 1892?

A. Why I should think it was somewhere near there.

Q. Have you been down there frequently?

A. Occasionally I go down to look at it.

Q. Did you see the land every time you was down there?

A. Yes, sir.

Q. Were you acquainted with its condition as to being overflow land or not?

A. Yes, sir.

Q. Were you familiar with the crops that were raised on that land?

A. Yes, sir.

Q. Did you become acquainted with the market value of lands in that vicinity?

A. Yes, sir.

Q. Do you know what the market value of this tract of land described in the petition was in August, or through the fall of 1907?

A. Yes, sir.

Q. What was the market value of the land at that time?

A. It was twelve or thirteen dollars an acre, for that is what it was sold for.

Mr. LARIMER: To which the plaintiff objects, and now asks the court to strike from the record the answer of the witness.

The COURT: What it was sold for is withdrawn from the jury, that part of the answer, and the jury is instructed not to consider it.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Mr. HARVEY: I think all of the answer should be stricken out.

The COURT: "For that is what it was sold for," that may be stricken out; the balance of the answer may stand.

To which ruling of the court the plaintiff at the time duly excepted.

Q. And you say that the fair market value of the land at that time from August, through the balance of the year 1907, was twelve to thirteen dollars per acre?

A. Yes, sir.

Q. Was it worth any more than that?

A. No, sir; it was really worth less, if anything.

Q. You said you had been acquainted with this land ever since it was allotted?

A. Yes, sir.

Q. Was all of this land allotted land?

Mr. HARVEY: To which the plaintiff objects as calling for immaterial testimony.

The COURT: This question may possibly be intended to further describe the land in some way; it might possibly bear upon its value or something like that. Overruled.

To which ruling of the court the plaintiff at the time duly excepted.

28 A. Yes, sir.

Q. Was all of this land allotted land?

A. Yes, sir.

Q. Had any fee simple patents been received for this land, or any part of it, from the government?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent and immaterial testimony.

The COURT: I think this raises the question that was thrashed out before and I think this court, in effect, held before that it was immaterial about the fee simple title of this land, and I see no reason to change my views on that point, and will sustain the objection.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. Was any of this land deeded land?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent and irrelevant testimony.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. Did you personally own any portion of this land?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

The COURT: I think it is immaterial.

Mr. AUSTIN: I desire to make an offer to prove in this connection. I offer to prove by this witness that at the time of the execution of this alleged contract set up in the petition all of the land described

29 in the petition as situated in Pottawatomie county, Oklahoma, was Indian land; allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under the provisions of an Act of Congress approved February 8th, 1887, entitled: "An Act to Provide for the Allotment of Lands in Severalty to Indians of the Various Reservations and Extending the Protection of the Laws of the United States and the Territories over the Indians and for Other Purposes," which patents declares that the United States does and will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of said Indians, and that this twenty-five year period with respect to these particular lands had not yet expired or been determined or abrogated by the Government at the date of the contract set up as a part of plaintiff's second amended and supplemental petition as amended.

Mr. HARVEY: To which the plaintiff objects for the reason that it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any issue in the case.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. I hand you a paper and ask you whether that is one of the original contracts that was signed by you and the plaintiff in this action on August 20th, 1907?

A. Yes, sir.

Mr. HARVEY: We now move to strike out the answer of the witness, and object to the question for the reason it calls for incompetent, irrelevant and immaterial testimony. It has not been offered at all.

30 The COURT: Overruled.

To which ruling of the court the plaintiff at the time excepted.

Q. By whom was that paper written?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony.

The COURT: Objection overruled.

To which ruling of the court the plaintiff at the time duly excepted.

The COURT: I have carefully considered the question submitted and I am unable to distinguish this case in principle from the 57 Kansas case, and, therefore, the objection will be sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. Mr. Sage, I will ask you whether at the time—the date of this memorandum attached to the petition in this case, the terms of an agreement between you and Mr. Hampe were talked over prior to the execution approving of this contract?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony.

The COURT: Do you mean the memorandum attached to the petition, the alleged contract?

Mr. AUSTIN: Yes.

The COURT: Objection sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. Mr. Sage, you may state—you may tell the conversation that you had there at that time prior to the signing of this agreement that is attached to the petition?

31 Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Mr. AUSTIN: I offer to prove by this witness that in a conversation that preceded the drawing of this contract, the plaintiff orally offered to take \$160.00 per acre for 81½ acres in Shawnee county, Kansas, but that said defendant did not accept the offer and said offer remained unaccepted. That this defendant orally offered to take \$20.00 per acre for 760 acres of land in Pottawatomie county, Oklahoma, but that said plaintiff did not accept the offer, that no time for the payment of the price of either one of these tracts of land was proposed or accepted or agreed upon by either party; that it was agreed that these oral offers on the part of plaintiff and defendant would not stand as a complete and certain contract for the trade or exchange of lands for each other, but only as mutual proposals as to the basis of the contract which might be thereafter entered into or not, as the parties thereto might determine, after the land of plaintiff had been further examined by the defendant, defendant's wife and son and daughter, and each party especially reserved his right to accept or reject such proposals until said examination; that the written agreement set out as a part of the petition was an attempt to reduce to writ-

ing the oral agreement by E. H. Hewins, and that Hewins, in so attempting to reduce to writing through ignorance or design, or mistake, omitted therefrom the agreement that the same should not stand as a complete and certain contract for the trade or exchange of lands, but only as mutual proposals as the basis of a contract which might thereafter be entered into or not as the parties might determine after the land of the plaintiff had been further examined by said defendant, said defendant's wife, son and daughter, and that each of said parties thereto reserved the right to accept or reject said proposals until after said examination, and that this defendant was induced to execute the same by the representation of the plaintiff and Hewins, that said omissions were immaterial, and that this defendant relied upon the truth of the representations. That the land was further examined by the persons who were to examine it and after such further examinations, the said proposals were rejected by the defendant and have never been accepted.

I further offer to prove by this witness that it was not agreed orally, nor in writing, by this defendant that he would purchase the tract of land described in the petition as situated in Shawnee county, or that he would sell or convey to the plaintiff the lands described in the petition as situated in Pottawatomie county, Oklahoma, or to trade or exchange the same for plaintiff's land in pursuance of said proposals, or otherwise.

MR. HARVEY: The offer is objected to as being incompetent, irrelevant and immaterial, and as not tending to prove or disprove any of the issues in this case.

THE COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

33 Q. Mr. Sage, going back to a subject I inquired a little earlier about, I will ask you whether at the time of the execution of this contract you had control in any manner of the lands described in the petition as situated in Pottawatomie county, Oklahoma?

MR. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony, and as tending to disprove the allegations of a written instrument, the execution of which is confessed, and the instrument on its face, when a man pretends to sell or trade land, carries with it the allegation that he is the owner of it.

THE COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. Did you have at that time any interest in this tract of land described in the petition in Pottawatomie county, Oklahoma?

MR. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony, and as tending to disprove the allegations of a written instrument, the execution of which is confessed.

THE COURT: The objection is sustained for the present, and I sug-

gest that if they want to show by this witness that he owns or controls other land in Pottawatomie county, Oklahoma, other than the tract set up in the petition, they can do so.

To which ruling of the court the defendant at the time duly excepted and still excepts.

34 Fred Sage testified in substance the same as Aaron Sage, the same questions, rulings, offers of proof, objections and exceptions being made and taken in his testimony as in that of Aaron Sage.

And after introducing certain depositions and testimony, all as to the value of the land described in the petition, the defendant rested.

This was the substance of all the evidence offered and introduced at the trial.

The defendant requested, among others, that the jury be instructed as follows, all of which were refused, the defendant excepting, (omitting caption and signatures) :

Instructions Requested by Defendant.

1. The jury are instructed that in order to charge the defendant upon a written contract for the purchase and sale or exchange of real estate, it is necessary that there be a written memorandum of the agreement, signed by the party to be charged, and it is necessary that the written contract shall state the whole of the contract, with all of its essentials, with reasonable certainty so that the substance will appear and be understood from the writing itself, or it shall contain a direct reference to some extrinsic facts, which, when shown to the court, the terms and conditions of the agreement and the property to which it relates will appear with reasonable certainty.

Refused and excepted to.

A. W. DANA, *Judge.*

2. And the jury are instructed that the written memorandum sued on in this case contains no description of the land for which the plaintiff agrees to take \$160.00 per acre, and contains no
35 description of the land for which the defendant agrees to take \$20.00 per acre, and there is no reference in the agreement itself to any extrinsic circumstances or fact from which the land for which the defendant agreed to take \$20.00 per acre can be ascertained and identified.

Refused and excepted to.

A. W. DANA, *Judge.*

3. The jury are instructed that the agreement sued on in this action is an agreement in relation to an exchange of the real estate for which the plaintiff offered to take \$160.00 per acre and the real estate for which it is alleged the defendant offered to take \$20.00 per acre, and the same containing no description of the real estate for which it is alleged the defendant offered to take \$20.00 an acre

and no reference to any extrinsic fact or circumstance from which such description can be ascertained and identified—the agreement fails to meet the requirements of the law, notwithstanding the real estate for which the plaintiff agreed to take \$160.00 per acre has been satisfactorily ascertained and identified.

Refused and excepted to.

A. W. DANA, *Judge*.

4. The jury are instructed that if they find that the real estate described in the petition of the plaintiff as the land defendant is alleged to have agreed to sell plaintiff is Indian land, allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under an Act of Congress, under patents, which provided that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the
36 sole use and benefit of the Indians to whom such allotment shall have been made, and that at the time of the execution of the agreement sued on in this action, the said twenty-five year period had not expired and had not been abrogated, and that the plaintiff knew at the time of the execution of said agreement that the real estate alleged to be referred to is the same as the land for which the defendant offered to take \$20.00 per acre was Indian lands allotted under Acts of Congress, he was chargeable with knowledge of the terms of said Acts and conditions under which the land was held, and can not charge the defendant with damages for his refusal to carry out the agreement sued on in this action.

Refused and excepted to.

A. W. DANA, *Judge*.

5. The jury are further instructed that the execution and delivery of the trust patents attached to the defendant's answer herein is admitted by the pleadings, and that the title to the real estate described therein continued by the legal effect of said instruments, to be held by the United States in trust for the period of twenty-five years from the date thereof, January 19, 1892, for the sole use and benefit of the allottee named therein, and that any conveyance or contract made by said allottee touching the said lands before the expiration or abrogation of said period of twenty-five years is absolutely null and void. The burden is, therefore, upon the plaintiff to establish that said trust period had been abrogated and that
37 the defendant had become the owner of it legally or equitably at the time of the execution of the agreement sued on in this action, before he can recover in this action.

Refused and excepted to.

A. W. DANA, *Judge*.

6. The jury are further instructed that if the trust period of twenty-five years had not been terminated at the date of the agreement sued on in this action, the defendant was not the owner of the real estate described in the trust patents attached to the answer of defendant and the same cannot be regarded as the land referred to or intended to be referred to in said agreement. No oral repre-

sentations or claims made by or control exercised by the defendant, over the lands described in these trust patents, can be considered for the purpose of identifying the land referred to or intended to be referred to in the agreement sued on in this action.

Refused and excepted to.

A. W. DANA, *Judge*.

7. And the jury are further instructed that if they find that the oral agreement made by plaintiff and defendant, at the time the written agreement sued on in this action was signed, was that the plaintiff offered to take \$160.00 per acre for 81½ acres in Shawnee county, Kansas, and that the defendant offered to take \$20.00 per acre for 760 acres of land in Pottawatomie county, Oklahoma, but that neither accepted the offer of the other and that said offers would not stand as a complete and certain contract for the trade or exchange of the land for each other, but only as mutual proposals as

38 to the basis of a contract which might be thereafter entered into or not, as the parties thereto might determine after the land of the plaintiff had been further examined by the defendant, the defendant's wife and son and daughter, and each party especially reserved his right to accept or reject said proposals until said examination, and that in attempting to reduce said oral agreement to writing, E. H. Hewins, through ignorance, design or mistake, omitted therefrom the agreement that the same was not to stand as a complete and certain contract for the trade or exchange of lands, but only as mutual proposals as the basis of a contract which might be thereafter entered into or not as the parties might determine after the land of the plaintiff had been further examined by the defendant's wife, son and daughter, and that each of the parties reserved the right to accept or reject said proposals until after said examination, and that defendant was induced to sign the agreement with such omissions by the representations of the plaintiff and Hewins that the omissions were immaterial, which representations were relied on by the defendant, and that after such further examinations by the defendant, his wife, son and daughter, the proposals were rejected by the defendant, then I instruct you that the agreement should be treated as though such omissions were inserted therein and that the agreement never became effective as a complete and final agreement between the parties, and your verdict should be for the defendant.

Refused and excepted to.

A. W. DANA, *Judge*.

8. The jury are instructed that if they find that the agreement sued on in this action was not intended to stand as a complete and certain contract between the plaintiff and defendant for the sale of either of said tracts of land described in the petition or for the trade or exchange of the same for each other, and that the same was only intended to be mutual proposals as the basis of a contract which might be entered into or not thereafter, as the parties might determine, and that the defendant reserved the

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right to accept or reject the proposals of the plaintiff and that the proposals of the plaintiff never have been accepted by the defendant, then your verdict should be for the defendant.

Refused and excepted to.

A. W. DANA, *Judge*.

9. The jury are instructed that if you find that at the time, or subsequent to the execution of the agreement sued on in this action, it was agreed between the plaintiff and defendant that the acceptance by the defendant of the proposals of the plaintiff therein should be subject to an examination of the plaintiff's land by defendant's wife and daughter and his son, and son's wife, and their approval and satisfaction with the same, and that the said land when examined by them was not approved or accepted by them, but, on the contrary was rejected by them, then the agreement never became effective as a complete and final agreement between the parties, and your verdict should be for the defendant.

Refused and excepted to.

A. W. DANA, *Judge*.

10. The written agreement sued on in this action is insufficient in itself without parol evidence in aid of the writing, to satisfy the requirements of the Statute of Frauds of this State, and the burden is upon the plaintiff by clear and convincing evidence, beyond a reasonable doubt, to prove that the real estate described in

40 the petition is the land referred to in the written agreement.

Refused and excepted to.

A. W. DANA, *Judge*.

Thereupon the defendant requested the court to submit to the jury the following special questions, which the court refused to submit, the defendant excepting:

Question No. 1. Was the Oklahoma land described in plaintiff's petition at the date of the execution of the agreement sued on in this action, August 20th, 1907, Indian land allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under patents which provided that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made and which period had not then expired or otherwise terminated?

Answer. —.

Question No. 2. Had the United States made any patent or conveyance of the Oklahoma land described in the plaintiff's petition at the date of the execution of the agreement sued on in this action, August 20th, 1907, other than the trust patents referred to in Question No. 1?

Answer. —.

Question No. 3. Was the defendant, at the date of the execution of the agreement sued on in this action, August 20th, 1907, the owner of the Oklahoma land described in the plaintiff's petition?

Answer. —.

41 Question No. 4. Did the plaintiff know at the date of the execution of the agreements sued on in this action, August 20th, 1907, that the Oklahoma land described in the plaintiff's petition was Indian land allotted and patented by trust patents to members of the tribe of Pottawatomie Indians and not to the defendant?

Answer. —.

Thereupon the court instructed the jury, the defendant objecting and excepting separately to the giving of each and every instruction given, as follows, to-wit:

"GENTLEMEN OF THE JURY:

This is an action in which George Hampe is plaintiff and Aaron Sage is defendant. The plaintiff, in his petition, alleges in substance, that on the 20th day of August, 1907, plaintiff and defendant entered into a contract, a certain written contract, by the terms of which plaintiff agreed to exchange his property described in the petition located in Shawnee county, Kansas, for property of the defendant located in Pottawatomie county, Oklahoma, on the terms set forth in the contract, a copy of which is made a part of the petition in this case, and defendant charges that he has been ready and willing to perform his part of the contract and has offered to do so, and that the defendant, however, has failed and refused to perform his part of the contract, by reason of which plaintiff claims that he has been damaged in the sum of \$7,652.50, for which he asks judgment in this case with interest thereon at the rate of six per cent. per annum from the 16th day of October, 1907.

42 The defendant files an answer to this petition wherein he denies generally all the material allegations set up in the petition and denies that he ever executed a contract such as plaintiff claims this instrument to be, and denies that he was the owner of all the lands described as located in Pottawatomie county, Oklahoma, and alleges a part of said lands were Indian lands, and denies all liability and plaintiff's right to recover in this action, and these constitute the issues for you to try in this case according to the law as the court shall give it to you, and the facts as you have learned them from the witnesses.

The execution of the contract sued upon in this case not being denied under oath, the court instructs you is admitted under the pleadings, and the court further instructs you that said contract, taken as a whole, constitutes a legal and binding obligation upon the parties to this action to exchange the properties described and set up in the petition on the terms set forth in said contract; and if you find from the evidence in this case that plaintiff was ready and willing to perform his part of this contract, but that defendant failed and refused to perform his part, then I instruct you plaintiff would be entitled to recover such actual damages in this case as the evidence shows that he has suffered by reason of defendant's failure to honestly perform his part of the contract, provided you find plaintiff offered to perform

his part, and made a proper demand upon the defendant to perform his part before this suit was begun.

If you find for the plaintiff, gentlemen, it makes it necessary for the court to instruct you as to the proper measure of damages to apply to this case. If you find in favor of the plaintiff, then the
43 amount of his recovery would be the excess of value of the consideration which he was to receive, over and above the market value of the Shawnee county land; that is, you should ascertain the market value of the Oklahoma land at the time of the contract of sale and the market value of the Shawnee county land at the time of the contract of sale, then add to the market value of the Shawnee county land as found the sum of \$2,160.00, which sum represents the amount plaintiff was to pay to the defendant for the Oklahoma land, over and above the value of the Shawnee county land. After adding to the value of the Shawnee county land the sum of \$2,160.00, the total should be subtracted from the market value of the Oklahoma land as found by you, and the result will be your verdict, and if the market value of the Oklahoma land as found by you should be no more or less than the value of the Shawnee county land with the sum of \$2,160.00 added thereto, then the recovery of the plaintiff should be for a nominal sum only.

The burden of proof is upon the plaintiff to prove his cause of action by a preponderance of the evidence. By a preponderance of the evidence is simply meant a greater weight of evidence. When you have examined all the evidence and weighed it carefully, if you find there is a greater weight on the side of the plaintiff than on the side of the defendant, then plaintiff has proven his cause of action by a preponderance and your verdict should be for the plaintiff.

You are the exclusive judges of the facts and of the credibility of the witnesses in the case. You will be required to answer
44 certain special questions submitted to you by the attorneys; these questions should be answered truthfully from all the evidence in the case. You are not obliged to answer each question yes or no, but you will take up the questions and answer them as submitted to you and your answer should be a full and complete answer to the question you are answering.

Before you can find for the plaintiff in this cause you must find that the land described in his petition as situated in Pottawatomie county, Oklahoma, is in fact the land referred to in the written contract executed by plaintiff and defendant and attached to the petition in this cause, and that at the time of the execution of said contract the defendant owned no other land and did not claim to own or have control of any other land in said Pottawatomie county, Oklahoma, and that the land described in the petition as situated in Shawnee county, Kansas, is in fact the same land as that referred to in said contract, and that the plaintiff at the time of the execution of said contract owned no other land within Shawnee county."

After the argument, in handing the special questions and forms of general verdict to the jury, the court further instructed the jury that if they found for the plaintiff they would allow him interest on the

amount they found due to him under the instructions heretofore given them, from October 16th, 1907, the date of the commencement of the action to the day of trial.

And afterwards, the jury returned the following verdict and answers to special questions, to-wit: (Omitting captions and signatures.)

45 "We the jury empanelled and sworn in the above-entitled case do upon our oaths find for the plaintiff and assess his damage at \$2,647.66.

5. What was the fair market value of the Oklahoma land described in the plaintiff's petition on August 20, 1907?

A. \$13,680.00.

6. What was the fair market value of the Oklahoma land described in the plaintiff's petition in October, 1907?

A. \$13,680.00.

7. What was the fair market value of the Shawnee county land described in the plaintiff's petition on August 20, 1907?

A. \$9,291.00.

8. What was the fair market value of the Shawnee county land described in the plaintiff's petition in October, 1907?

A. \$9,291.00."

And afterwards, in due time, the defendant filed his motion for judgment notwithstanding the verdict of the jury and also for a new trial, which motions read as follows, to-wit: (Omitting caption and signatures.)

Motion for Judgment.

"Comes now said defendant, Aaron Sage, and moves the court for judgment in favor of the defendant for costs, notwithstanding the verdict of the jury—for the reason:

"That upon the pleadings, evidence and findings of the jury plaintiff has failed to allege and establish facts sufficient to entitle him to judgment in his favor against the defendant herein and this defendant is entitled by law to judgment in his favor."

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Motion for New Trial.

"Comes now said defendant, Aaron Sage, and moves the court to set aside the verdict of the jury heretofore rendered in this action and to grant the defendant a new trial hereof, for the following reasons:

1. Because of the error of the court in overruling this defendant's demurrer to plaintiff's evidence.

2. Because of the error of the court in overruling objections of defendant and in admitting incompetent evidence offered by the plaintiff.

3. Because of error in the exclusion of competent evidence offered by the defendant which exclusion was excepted to at the time by the defendant.

4. Because of erroneous rulings and instructions of the court and the refusal of the court to give the instructions requested by the defendant, and error of law occurring at the trial and excepted to by defendant at the time.

5. Because the said verdict is contrary to the evidence and the law and is not sustained by the evidence."

And afterwards, the said motions of said defendant having been argued the court overruled the same, the defendant excepting, and plaintiff excepting, judgment having been rendered on the verdict, the defendant excepting.

In due time thereafter the defendant served a proper notice of appeal to this court from said judgment and order overruling said motions for judgment and for a new trial.

47 The foregoing is a complete abstract of the case above entitled.

EDWIN A. AUSTIN,
C. E. CARROLL,
Attorneys for Appellant.

Assignments of Error.

1. The court erred in overruling defendant's objections to the testimony of plaintiff and E. H. Hewins to conversation with the defendant prior to the execution of the written agreement sued on in this action.

2. The court erred in overruling defendant's demurrer to plaintiff's evidence.

3. The court erred in sustaining plaintiff's objections to questions put to defendant and Fred Sage and to the offers to prove by said witnesses, and in excluding the answers and proof offered from the jury.

4. The court erred in refusing to submit to the jury the special questions requested by the defendant.

5. The court erred in refusing the instructions requested by the defendant.

6. The court erred in its instructions to the jury.

7. The court erred in overruling defendant's motion for judgment in his favor, notwithstanding the verdict.

8. The court erred in overruling defendant's motion for a new trial.

EDWIN A. AUSTIN,
C. E. CARROLL,
Attorneys for Defendant.

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49 Be it further remembered, that afterward on Thursday the 6th day of June 1912, the same being one of the regular judicial days of the January A. D. 1912 term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceedings among others were had and remain of record at page — of Journal "QQ" in the words and figures as follows, to-wit:

50 In the Supreme Court of the State of Kansas, Thursday, June 6, 1912.

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Journal Entry of Submission.

The court having heretofore ordered a re-argument of this case upon certain specified questions, this cause now comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Shawnee county; thereupon said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

51 Be it further remembered, that afterwards on Saturday the 6th day of July A. D. 1912, the same being one of the regular judicial days of the July A. D. 1912 term of the supreme court of the state of Kansas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:

52 In the Supreme Court of the State of Kansas, Saturday, July 6th, 1912.

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Journal Entry of Judgment.

This cause comes on for decision; thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at \$—, and hereof let execution issue.

53 And on the same day to-wit, the 6th day of July, A. D. 1912, there was filed in the office of the clerk of the supreme court of the state of Kansas, the syllabus and opinion of the supreme court, which syllabus and opinion are in the words and figures as follows, to-wit:

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Appeal from Shawnee County, Affirmed.

Syllabus by the Court.

PORTER, J.:

1. Hampe v. Sage, 82 Kan. 728, 109 Pac. 408, followed and held, that the amendment to the petition alleging that the land described in the memorandum which evidenced the contract between the parties was the only land in Pottawatomie county, Oklahoma, which the defendant owned or claimed to own or have an interest in, was sufficient to satisfy the provision of the statute of frauds which requires contracts for the conveyance of lands to be in writing.
2. Held, further, that evidence of statements and admissions of the defendant made shortly before the memorandum was executed, to the effect that he owned the land described therein and that he owned no other land in that county, was competent for the purpose of showing that in fact he owned and claimed to own no other tract of land in that county.
3. The fact that the lands described in the memorandum were Indian lands held in trust for the allottees, who were members of the tribe of Pottawatomie Indians, and that under an act of Congress and the terms of the trust patents issued for said

lands, any conveyance or contract with reference thereto is declared to be absolutely null and void, will furnish no defence to an action for damages for breach of a contract by the defendant to sell and convey such lands.

Burch, J., Mason, J., and West, J., concurring.
Benson, J., Johnston, C. J., and Smith, J., dissenting.

A true copy.

Attest:

Clerk Supreme Court.

55 The opinion of the court was delivered by

PORTER, J.:

Action for damages for the breach of a contract for the exchange of lands. The jury in answer to special questions found the value of the Oklahoma lands which the defendant agreed to convey to plaintiff, the value of plaintiff's land in Shawnee county, Kansas, which he was to convey to the defendant, and returned a general verdict in plaintiff's favor for the difference, amounting to \$2,647.66. Judgment was rendered thereon for the plaintiff and the defendant appeals.

A former judgment for the plaintiff was reversed on the ground that the petition was demurrable under the statute of frauds because the contract for the sale and exchange of the land was evidenced by a memorandum which failed to describe the Oklahoma land or to state any fact, beyond its acreage and the county of its location, which might help to identify it. (*Hampe v. Sage*, 82 Kan. 728, 109 Pac. 408.) In the opinion it was intimated that the petition would not have been demurrable if it had contained an allegation that the land referred to in the memorandum was the only land in that county owned by the defendant. After the cause was remanded, the plaintiff amended his petition as follows:

Said tract of land was the only land in Pottawatomie County, Oklahoma, which said defendant then owned or claimed to own or have dominion over or control of or in which he had or claimed to have any interest."

The defendant's answer, besides a general denial, alleged that at the time the memorandum was executed, the land described therein was, as plaintiff well knew, Indian land allotted and patented to members of the tribe of the Pottawatomie Indians and not to the defendant; and further pleaded an act of Congress approved February 8, 1887, providing that any conveyance or contract made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents and said act of Congress, shall be absolutely null and void. The answer set out copies of the patents to the lands in question, and alleged that the twenty-five-year period

56 from the date of the allotment and issue of the trust patents had not expired or been abrogated at the date of the alleged contract with defendant. The reply was an unverified general denial.

On the trial plaintiff proved by two real estate agents of Topeka that defendant listed the Oklahoma land with them for sale. They produced the original entries in their books showing the description of the lands with Sage marked as the owner, and testified that he dictated the description, read over the same and approved it; that he stated to them that he owned the land and would sell it at \$20 an acre, and that it was the only land he owned or controlled in Oklahoma. The plaintiff proved that the defendant made similar statements to him on different occasions, and also to witness Hewins, who went to see the land a short time before the contract in question was entered into. The first claim of error is that this testimony should have been excluded, that it was an attempt by parol evidence to establish an essential element of a contract required to be in writing. It is argued that the memorandum does not say that the land referred to was that listed with these real estate agents, or that referred to in the conversations to which the witnesses were permitted to testify. In support of this contention the former opinion is relied upon wherein it was held that to allow the land to be identified by proof that the defendant had showed to plaintiff a certain tract of land in Pottawatomie county, Oklahoma, containing 760 acres, and that this was the land referred to in the memorandum, would be the same as to permit an essential element of the contract to be supplied by parol; that while it is always competent to offer parol evidence to identify the description, it is never admissible for the purpose of supplying a description which the parties have omitted from the writing. This statement of the law was made in answer to plaintiff's contention on the former hearing that the defect in the petition was cured by alleging and proving that defendant, previous to the execution of the memorandum, had *showed* him a certain tract in Pottawatomie county, Oklahoma, containing the acreage mentioned, and that this was the land referred to in the memorandum. It was held

57 that proof of this character would have been admissible and sufficient to render the contract definite, provided the memorandum itself, after the reference to the Oklahoma land, had contained the words "being the tract recently *showed* by Sage to Hampe." (Hampe v. Sage, *supra*, p. 730.)

The contention that the court erred in the admission of testimony showing statements and admissions made by Sage to the effect that he owned this tract of land and that it was the only land in Pottawatomie county, Oklahoma, that he did own or claim to own or control, the contention that the court erred in refusing to sustain the demurrer to plaintiff's evidence, as well as most of the other contentions raised by the defendant, are met and fully answered in the former opinion. It was there said:

"Under the authorities cited, a recital that Sage owned the land which he undertook to convey can be found in the contract itself, by a liberal interpretation of its terms. Proof that he owned no

other land in that county would then render the description, as so interpreted, absolutely definite." (*Hampe v. Sage*, supra, p. 733.)

That Sage owned the land he undertook to convey may by a liberal interpretation of the terms of the memorandum be found in the writing itself. All that was necessary to make the petition good as against a demurrer was to plead the fact that he owned or claimed to own only the stated number of acres in that county. The plaintiff amended his petition by so alleging. On the trial proof that defendant owned or claimed to own that number of acres and no more, in Pottawatomie county, Oklahoma, was all that was necessary to render the description of the land which the parties had in mind and about which they negotiated, absolutely definite. The defendant's statements made at or about the time the contract was entered into were admissible as proof that he claimed to own land of that acreage so situated and that he owned no other land in that county. Proof of his statements that in fact he owned this land could not hurt him because the memorandum itself is to be interpreted as so stating.

Another contention of the defendant is that since the un-
58 verified reply admitted the issue of trust patents for these lands and the provision of the act of Congress declaring any conveyance or contract with reference to such lands absolutely void, there was an utter failure of proof showing that Sage owned the lands, and, on the contrary, an admission that he could not possibly own or convey them. In the brief it was said that

"This clause in the Act of Congress, of course, does not directly apply to any contract made with George Hampe by Aaron Sage, but it does apply to any conveyance or contract made by the allottee members of the Pottawatomie tribe to whom this land was patented, and by disqualifying them from conveying or contracting to convey to another, renders it apparent that Aaron Sage was not the owner of any of this particular land, and not only nullifies any conveyance and contract he may have obtained from the Indian allottees, but nullifies, as against them, any contract he may have made with George Hampe."

The defendant argues that it was incumbent upon plaintiff to offer some proof to show that the twenty-five-year period during which these lands were not subject to sale or contract had expired; that for the purpose of satisfying that provision of the statute of frauds which requires contracts in reference to the sale of lands to be in writing it was competent for the plaintiff to prove that the defendant in fact owned this land and in fact owned no other land in that county, but that plaintiff failed to satisfy the statute of frauds for the reason that he failed to prove that defendant in fact owned this land, while on the contrary the pleadings as they stood showed conclusively that he never did own it. But it has been repeatedly held that a person may contract to sell and convey lands of which he is not the owner and may become liable for damages for the breach of such contract. (*Trust Co. v. McIntosh*, 68 Kan. 452, 462, 75 Pac. 498; *Krhut v. Phares*, 80 Kan. 515, 103 Pac. 117; *Robertson v. Talley*, 84 Kan. 817, 820, 115 Pac. 640.) In the last case it was ruled in the syllabus that

59 "One may bind himself personally by an agreement to furnish a deed to land owned by another, even when he had no present interest therein and no means of compelling a conveyance." (Par. 1.)

In the opinion it was said:

"No reason is apparent why he may not bind himself personally by a contract that he will procure a deed to land, although he is not certain that he will be able to do so, thereby incurring liability for damages if he shall fail, and for loss by the bargain if he shall be compelled to pay more for the property than he is to receive." (P. 820.)

The answer alleges that the lands referred to in the petition were patented to Indians of the "Citizen Pottawatomie Tribe or Band," under an act of congress approved February 8, 1887, which declares that any conveyance or contract made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents shall be absolutely null and void, that the twenty-five-year period from the date of the allotment and trust patent had **not expired** and had not been abrogated at the date of the alleged contract sued upon. The appellee calls attention to two subsequent acts of congress which, it is claimed, gave to the Citizen Pottawatomie Indians the right to sell their lands under certain conditions. The first of the later acts provides:

"That any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma, to whom a trust patent has been issued under the provisions of the Act approved February eight, eighteen hundred and eighty-seven (Twenty-fourth Statutes, three hundred and eighty-eight), and being over twenty-one years of age, may sell and convey any portion of the land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to approval by the Secretary of the Interior under such rules and regulations as he may prescribe, and that any Citizen Pottawatomie not residing upon his allotment, but being a legal resident of another State or Territory, may in like manner sell and convey all the land covered by said patent, and that upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named." 28 U. S. Stat. at Large, 295.

60 The second of the later acts provides:

"That the proviso to the Act approved August fifteenth, eighteen hundred and ninety-four, permitting the sale of allotted lands by members of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma is hereby extended so as to permit the adult heirs of a deceased allottee to sell and convey the lands inherited from such decedent; and if there be both adult and minor owners of such inherited lands, then such minors may join in a sale thereof by a guardian, duly appointed by the proper court, upon an order of such court made upon petition filed by such guardian, all conveyances made under this provision to be subject to the approval of the Secretary of the Interior; and any Citizen Pottawatomie or Absentee Shawnee not residing upon

his allotment, but being an actual resident of another State or Territory, may in like manner sell and convey all the land allotted to him." 31 U. S. Stat. at Large, 247.

It is apparent from these subsequent statutes that the Citizen Pottawatomie Indians were given the right under certain conditions to dispose of their lands; and while the subsequent acts of congress do not in terms abrogate the inhibition against the validity of contracts for the sale of such lands declared in the act of 1887, it seems obvious that when the allottee was permitted to sell his lands, any contract made by others in relation thereto would not be void. There was no allegation in the answer nor any proof offered that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later acts of congress. We do not rest our decision, however, upon the effect of the acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for damages for the breach of his contract to sell and convey the lands in question although he may have had no present interest therein and no means of compelling a conveyance at the time he entered into the contract.

It was not incumbent upon the plaintiff to offer proof that
61 the defendant in fact owned the lands referred to in the contract or that the twenty-five-year period in which they were not subject to sale had expired. All that was required was to offer proof for the purpose of identifying the land that was attempted to be described in the memorandum in order to show what land the parties intended and thus to satisfy the statute of frauds. This does not mean that the plaintiff would be permitted to state what his understanding was as to the land intended, or that oral testimony in such cases is admissible for that purpose. Where the petition alleges that the tract of land attempted to be described is all the land in the county mentioned which the person who agreed to convey the land at that time owned or claimed to own and that there was no other land in that county which he owned or claimed to own, except that attempted to be described in the contract or memorandum, the statute of frauds is satisfied by proof of these facts. (*Bacon v. Leslie*, 50 Kan. 494, 31 Pac. 1066; *Hampe v. Sage*, *supra*, and authorities cited.) The evidence of defendant's admissions was competent and the demurrer to the evidence was rightly overruled. For the same reason the court properly refused to permit the defendant to show that in fact he had no title to the lands in question.

Complaint is made that the court should have permitted the defendant to offer oral testimony to the effect that the written contract did not express the agreement of the parties; that both parties intended merely to make a proposition which either had the option to accept or refuse. It hardly seems necessary to cite authorities to show that the admission of evidence of this character would have been to vary and contradict a written contract by parol and that the court rightly rejected it and refused the instructions and special questions in respect thereto.

Interest on the amount of damages was properly allowed from the

time when the contract was breached, which would ordinarily be in cases of this character when plaintiff tendered performance. In this case the deed was tendered by plaintiff at the time the action was commenced. (*Croft v. Bent*, 8 Kan. 328; *Stebbins v. Wolf*, 33 Kan. 765, 771, 7 Pac. 542.)

The judgment is affirmed.

Burch, J., Mason, J., and West, J., concurring.

BENSON, J. (dissenting):

It was held in the former opinion that in the absence of an allegation that the tract referred to in the contract was the only land of the vendor in the designated county an averment that it was so in fact was insufficient. It was said that to allow proof that the land had been so identified would be to permit an essential element of the contract to be proved by parol evidence. For the same reason proof that the vendor had stated to the agents that it was the only land he owned in the county was insufficient for there was no allegation in the petition that he had made such statements. Besides no connection was shown between the agency and the contract in question. The statements to the same effect made to the vendee were parts of conversations occurring three or four weeks before the contract and they were not referred to in any manner when the contract was executed.

It has been held that parol evidence of a previous oral agreement which is the only means of identification referred to in the memorandum can not be taken into consideration to complete it. (*Whelan v. Sullivan*, 102 Mass. 204.) If an actual agreement is insufficient it can not be that mere conversations referring to a possible or even contemplated agreement are sufficient to identify the subject matter in a contract afterwards made, especially in the absence of any reference thereto, either in the contract, or at the time of its execution.

In the same conversation between the parties relied upon to prove the necessary identification, the vendee was informed that the tract was Indian land for which a patent had not been issued. Ownership in the government and the absolute restriction upon alienation were matters of public law. At the time therefore when the vendee was informed that this tract was the only land of the vendor in the county he had notice of the fact that it could not be conveyed by any one—that it was not the subject of private ownership. Parol proof of this nature is allowed to identify the land only because it may be presumed that a person intends to convey that which he owns. In view of the mischiefs to be avoided by the statute of frauds, proof strictly within the rule is hazardous enough. It should not be stretched to include that which the vendor only claims, but which the other party knows he can not convey.

The contract was void because so declared by paramount law. The government owned the land and prescribed the conditions. It stipulated with the Indian to hold the title in trust for him for twenty-five years and declared that any previous contract to convey

should be void. Damages can not be recovered for breach of a void contract. It is contrary to public policy to attempt to obtain that which the government as guardian for the Indian is holding for his benefit, and no court should directly or indirectly lend its aid to a connivance to that end.

The provision made by a subsequent statute for the issuance of patents in fee simple afterwards upon certain conditions, emphasizes the original restrictions. The act of 1896 declares "And thereafter (after patents in fee simple are issued on the conditions prescribed) * * * all restrictions as to sale * * * shall be removed." * * * It is difficult to understand how this language can be interpreted to make a contract—declared by the former act to be void—to be nevertheless valid and enforceable.

While preliminary patents were authorized to be issued to allot-ees of these trust lands they were only certificates of the trust entirely in harmony with and intended to give effect to the declaration of the statute that any conveyance of the land or any contract touching the same before the expiration of the time mentioned shall be absolutely null and void. (United States v. Rickert, 188 U. S. 432.) Subsequent legislation does not assume to give life to that which never had life.

(Lewis et al. v. Clements, 21 Okla. 167;
 Simmons et al. v. Whittington, 27 Okla. 356;
 United States v. Dooley, 151 Fed. 697.)

Contracts which provide for anything directly prohibited by law or public policy are void. (2 Parsons on Con., 9th ed., 907.)

This is not a new doctrine in this court. In *Vickroy v. Pratt*, 7 Kan. 238, in an action by one citizen against another on a promissory note given for Indian land it was held that "A note given by one citizen of the United States to another, for the sale and delivery of possession of a tract of land to which the Indian title has not been extinguished, is void."

It was held in *Brake v. Ballou*, 19 Kan. 397, that a parol contract concerning the purchase and conveyance of lands belonging to the United States made in violation of the spirit of the federal laws and in fraud thereof can not be enforced specifically or otherwise. It was said in substance that although no fraud upon the government was intended it was nevertheless fraudulent to attempt to procure the title from the government in violation of its laws.

In an action to foreclose a mortgage upon Indian land it was said: "And it really makes no difference whether the land in controversy, at the time it was mortgaged, belonged absolutely to the Indians, or was held in trust by the government of the United States for the Indians. In either case the mortgagor had no interest in the land at the time he mortgaged it, and therefore the mortgage was void." (*Lucas v. Sturr*, 21 Kan. 349.)

In an action upon a note given for a tract of Osage ceded land this court said:

65 "The contract between the plaintiff and defendant was illegal and void, and the note was given without any sufficient consideration. After the defendant purchased the land,

or the claim thereto, from the plaintiff, he had no right to go upon it, and if he had done so, he would have been a trespasser." (Jarvis v. Campbell, 23 Kan. 370.)

Chief Justice Johnston concurs in this dissent.
Smith, Jr., concurs in dissent.

A true copy.

Attest:

Clerk Supreme Court.

66 Be it further remembered, that afterwards on the 26th day of July, 1912, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, a petition for a rehearing of this cause, which petition for a rehearing is in the words and figures as follows, to-wit:

67 In the Supreme Court of Kansas.

No. 16583.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Petition for a Rehearing.

Lee Monroe, W. S. Roark, Carr W. Taylor, attorneys for appellant.

68 In the Supreme Court of Kansas.

No. 16583.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Petition for a Rehearing.

Comes now the appellant and moves the court for a rehearing of this cause for the following reasons, to-wit:

First. Because this case was tried and decided on the erroneous theory that if the appellant agreed to sell certain lands and failed to consummate the sale he was liable for damages even though such consummation was legally impossible because of the inhibition of the Indian land laws, a fact which the appellant knew, or was bound to know, when the agreement was made. Such a state of facts constituted a perfect defense to this action.

Second. Because both the trial court and this court overlooked

the controlling principle that in the absence of fraud or concealment by one of the parties thereto no recovery can be had, at law, for the breach of a contract which is either impossible of performance or forbidden by law.

Third. Because the written memorandum of agreement sued on was insufficient in law to take the case out of the operation of the statute of frauds, in that it did not sufficiently describe the lands which either party is alleged to have thereby agreed to sell.

All of which questions were fairly presented by the pleadings and the evidence produced or offered on the trial of this cause as is shown by the record filed in this court.

Statement.

Appellant's present counsel, who have assumed control of this case because of the absence from the State of the able lawyer previously in charge, earnestly ask for a rehearing that they may be afforded an opportunity to present and argue certain facts, legal principles and authorities which they deem controlling, and which appear to have been overlooked on the former hearing:

I.

The contract sued on was void because its performance was impossible.

Foremost among the principles which appear to have been overlooked upon the prior presentation and consideration of the case, is this: While, generally, one agreeing to sell property is liable in damages for a failure to consummate the sale, he will not be so held when, by his contract of sale, he agrees to do an impossibility, unless the other party was ignorant of the facts when the contract was made. The general rule applicable to this phase of the case is stated in Bishop on Contracts, Section 579, as follows:

"A mutual undertaking between parties to do what both know to be impossible is vain and idle, lacking the elements of contract, and no suit can be maintained thereon."

Now what are the facts in this case? Briefly stated the answer alleges that the Oklahoma property was, as appellee well knew, Indian land allotted to Clark H. Sage and other members of the Tribe of Pottawatomie Indians, and not to the appellant under the provisions of the Act of February 8, 1887, which, by its express terms, absolutely forbade any alienation of such lands for a period of twenty-five years after their allotment, and made all contracts touching the lands before the expiration of such period absolutely null and void. The twenty-five year period could not have expired when the agreement was made, because only twenty years had elapsed since the passage of the Act, and the patents set up in the answer recite that the allotments were made in September, 1891, less than sixteen years prior to the date of the contract. (Pp. 11 and 12.) It is true that Section 6 of the subsequent Act of May 8, 1906, contained a provision that the foregoing restrictions as to sale

might be removed by the issuance of a patent in fee simple to the allottee, but the answer, in effect, alleges that none of the restrictions of the prior Act had ever been so removed. It, therefore, alleges "a mutual undertaking to do what both knew to be impossible." If the allegations were true the undertaking was "vain and idle, lacking the elements of contract, and no suit can be maintained thereon." It is suggested in the opinion that these allegations were not proven, but the failure was not the fault of the appellant,

71 but was because the trial court rejected the proof when offered. For the purposes of this motion the case, therefore, rests upon the same basis as though the proof had been duly made. The true situation in this regard was clearly overlooked when the statement was made in the opinion that "there was no allegation in the answer nor any proof offered that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later Acts of Congress." In order that there may be no further misunderstanding relative to the facts in this regard we call attention to the following portions of the record. The answer alleges:

"That the land described in said second amended and supplemental petition * * * was at the time of the execution of said alleged contract, as said plaintiff then well knew, Indian land allotted and patented to members of the tribe of Pottawatomie Indians and not to this defendant under the provisions of the Act of Congress approved February 8th, 1887, * * * and in and by said Act of Congress it is provided that any conveyance or contract made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents and said Act of Congress, shall be absolutely null and void, and defendant says that said period of twenty-five years from the date of said allotment and trust patent had not expired and had not been abrogated at the date of the alleged contract set out in a part of plaintiff's second amended and supplemental petition as amended." (Abst., pp. 7-8.)

Upon the trial appellant proffered proof in support of these allegations and to show that the restrictions upon the sale of the lands in question had never been removed by the issuance of fee simple patents under the provisions of the sixth section of the Act of May 8, 1906, all of which proffered proof was rejected by the court in the manner following: When the appellant was upon the witness stand he was asked:

72 "Q. Had any fee simple patents been received for this land, or any part of it, from the government?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent and immaterial testimony.

The COURT: I think this raises the question that was thrashed out before and I think this court, in effect, held before that it was immaterial about the fee simple title of this land, and I see no reason to change my views on that point, and will sustain the objection.

Q. Was any of this land deeded land?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent and irrelevant testimony.

The COURT: The objection is sustained.

Q. Did you personally own any portion of this land?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony.

The COURT: The objection is sustained. * * * I think it is immaterial.

Mr. AUSTIN: I desire to make an offer to prove in this connection. I offer to prove by this witness that at the time of the execution of this alleged contract set up in the petition all of the land described in the petition as situated in Pottawatomie county, Oklahoma, was Indian land, allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under the provisions of an Act of Congress approved February 8th, 1887, entitled: 'An Act to Provide for the Allotment of Lands in Severalty to Indians of the Various Reservations and Extending the Protection of the Laws of the United States and the Territories over the Indians and for Other Purposes,' which patents declares that the United States does, and will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of said

73 Indians, and that this twenty-five year period with respect to these particular lands had not yet expired or been determined or abrogated by the government at the date of the contract set up as a part of plaintiff's second amended and supplemental petition as amended.

Mr. HARVEY: To which the plaintiff objects, for the reason that it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any issue in the case.

The COURT: The objection is sustained. (Pp. 17 and 18.)

Q. Mr. Sage, going back to a subject I inquired a little earlier about, I will ask you whether at the time of the execution of this contract you had control in any manner of the lands described in the petition as situated in Pottawatomie county, Oklahoma?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony, and as tending to disprove the allegations of a written instrument, the execution of which is confessed, and the instrument on its face, when a man pretends to sell or trade land, carries with it the allegation that he is the owner of it.

The COURT: The objection is sustained.

Q. Did you have at that time any interest in this tract of land described in the petition in Pottawatomie county, Oklahoma?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony, and as tending to disprove the allegations of a written instrument, the execution of which is confessed.

The COURT: The objection is sustained for the present, and I suggest that if they want to show by this witness that he owns or

controls other land in Pottawatomie county, Oklahoma, other than the tract set up in the petition, they can do so." (P. 22.)

74 The foregoing constituted, as we have remarked, a plain allegation that the conditions were such that the Oklahoma land was not a legal subject of sale when the contract was made, that the appellant, therefore, undertook to do an impossibility, and that the appellee was fully apprised of the facts. The proof tendered was squarely in line with and in support of the allegations but was rejected by the district court. The appellant, therefore, did everything possible to get the facts before the jury but was prevented from so doing because of the above objections and adverse rulings. Opposing counsel suggested in their brief on reargument that Sage had failed to prove that Hampe had knowledge of the condition of the title to the Oklahoma lands when the agreement was made. To begin with, Hampe himself admitted on the stand that Sage told him before the contract was signed "that it was Indian land and that they did not have a patent to it but he said he would get it." (P. 13.) Further proof of Hampe's knowledge was, therefore, unnecessary. Moreover appellant's counsel omitted no duty to make further proof of such knowledge. He tried, as we have seen, to prove the exact status to the title of the land. He propounded this question to the appellant as a witness: "Had any fee simple patents been received for this land, or any part of it, from the government." The court sustained an objection to the question, saying :

"I think this raises the question that was thrashed out before and I think this court, in effect, held before that it was immaterial about the fee simple title of this land, and I see no reason to change my views on that point, and will sustain the objection." (P. 17.)

75 This was, in effect, a square toed ruling that the question of the title was wholly immaterial and could not be proven. After such a ruling by the court counsel would, to say the least, have violated the ordinary rules of professional courtesy towards the court had he tried to prove knowledge on the part of Hampe of a situation which the court had already ruled was incompetent. It is perfectly plain from the record that the theory of the lower court, and of appellee's counsel as well, throughout the entire trial was, that if Mr. Sage had agreed to sell land and had failed to consummate his agreement he was liable in damages regardless of the status of the title or whether it could legally be conveyed or not. In fact, that exact proposition was argued in this court and is the basis of the opinion herein in which this language is used :

"We do not rest our decision, however, upon the effect of the Acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for damages for the breach of his contract to sell and convey the lands in question, although he would have had no present interest therein and no means of compelling a conveyance at the time he entered into the contract."

For the purposes of this appeal and especially of this petition for a rehearing the case rests upon the same basis as though the appel-

lant had, in fact, proven that the Oklahoma property was Indian land for which fee simple patent had not issued and was not, therefore, a legal subject of barter and sale under the Federal statutes.

If further authority than that already cited upon the proposition that an agreement to do a thing which is impossible of performance constitutes a void contract be necessary we submit the following:

"But if one promises to do what cannot be done, and the impossibility is not only certain but perfectly obvious to the promises, * * * such a contract must be void for its inherent absurdity." (2 Parsons on Contracts, 6 Ed. 673.)

It was, accordingly, held in *Strahn v. Hamilton*, 38 Indiana, 57, that a note given for a transfer of a liquor license was void because it was impossible under the law for the holder of the license to transfer it. So likewise it has been held that a promise to marry by one already married and known to be so by the promisee is void.

Haviland v. Halstead, 34 N. Y. 643.

In *Bennett v. Morse*, 6 Col. App. 122, 39 Pac. 582, it was held that a joint contract of sixteen persons each to purchase and pay for 400 shares of capital stock of a corporation having only 5,000 shares bound the parties to do an impossibility and was, therefore, void. The court said:

"If they had been jointly sued, the plaintiffs must have been ready to deliver to them 6,400 shares; but there were only 5,000 shares from which they could be taken. Such a contract is inherently absurd. The parties could not purchase, and the plaintiffs could not deliver 6,400 shares from 5,000 shares. * * * If the agreement had by its terms been several, a recovery could have been had against each of the parties as long as the stock remained unexhausted, * * * but, the contract being joint, and, as a joint contract, being upon its face impossible of performance, it is void, and no action is maintainable upon it against all or any of the parties to it."

"If the consideration is obviously and on the face of the contract impossible, it is no consideration and will not support an agreement. * * * Impossibility is either (1) physical, or (2) legal." (9 Cyc. 326.)

"A promise to do something which is either impossible in law, or physically impossible, is no consideration. * * * The consideration may be either (1) impossible in law, or (2) physically impossible." (Clark on Contracts, 2 Ed., p. 134.)

In *Anthony v. Sewing Machine Co.*, 16 R. I. 571, 18 Atl. 176, it was held that a contract to sell preferred stock which the corporation had no power to issue was void. The court said:

"But there is no contract, the contract set up being a nullity, because the corporation had no power to bind itself by it."

Under the pleading and the proffered proof the agreement sued on herein was absolutely impossible of performance. The allottees could not sell, hence neither the appellant nor appellee could possibly have become the owner of the Oklahoma land. The answer alleges

that the appellee was fully cognizant of the facts. He was bound to know the law. Mr. Bishop in his work on Contracts, says:

"SEC. 583. Impossibility of law: * * * As both parties are conclusively presumed to know the law, stipulations to do what is simply against the law are void."

"SEC. 471. Any act which is forbidden either by the common or the statutory law—whether it is *malum in se*, or merely *malum prohibitum* * * * cannot be the foundation of a valid contract; nor can anything auxiliary to, or promotive of, such act."

In one of appellee's briefs it is argued that the rule that contracts are presumed to be valid is applicable to this case. It is clearly a fallacy to ask the application of that rule to a case where the
78 contract is shown by the pleadings and proffered proof to be of a class that is void unless given force by reason of some exception, condition or act intervening. The presumption of validity can never be obtained where the contract can be valid only because something has transpired to constitute an exception. To illustrate: "A" sues "B" for breach of a contract and alleges that prior to the making of the contract "B" was adjudged insane and placed under guardianship. In such a case the court, instead of presuming the contract to be valid, will presume it to be invalid in the absence of proof that "B" has been restored to sanity.

II.

A contract to convey Indian lands before the statutory restrictions upon their alienation had been removed is impossible of fulfillment, such a contract is void whether made by the allottees or others, and no recovery can be had thereon by either party.

The question of the effect of contracts to sell Indian lands within the restricted period or any public lands not subject to sale and of attempts to convey such lands have often been before the courts.

In *Larson v. First Nat. Bank*, 62 Nebr. 303, 87 N. W. 18, the bank, an innocent purchaser, held a negotiable promissory note given by Larson to a Live Stock Company for rent on lands allotted to Indians under the Act of February 8, 1887, leased by the al-
79 lottees to the Live Stock Company and sub-let by the Company to Larson. The court held the whole transaction void and that any contracts of any sort relating to a conveyance of such lands could not be made the basis of a legal agreement. It said:

"The rule that a tenant cannot dispute the title of his landlord is urged as an estoppel against the plaintiff in error, and it is insisted that, having taken a lease from the Fournoy Company, he ought not to be allowed to show the invalidity of the title of that company as a defense to the note. * * * If, as Congress has declared, this lease was absolutely null and void, we cannot comprehend how any right of any kind can be founded on it or grow out of it. How can one claim another as his tenant under an agreement which the law declares shall have no existence, and under which no right or duties of any character can be claimed? * * * To allow any right to be founded on a lease of the character of the one in question would

be offering a premium to those reckless enough to assume the attitude of landlord over the lands with which the government has forbidden them to deal."

The plaintiff, Steinmetz, in *Williams v. Steinmetz*, 16 Oklahoma, 104, 82 Pac. 986, leased a tract of land which had been allotted under the Act of February 8, 1887, from the allottee, took possession thereof, fenced it and planted it to corn. Afterwards a herd of cattle, part of which belonged to the allottee and part to another person, broke through the fence and destroyed the corn. Steinmetz sued both the allottee and the other owner of the cattle for the value of the corn, but the court held he could not recover from either of them. It said:

"The making of the lease in question was plainly a violation of this statute. It was 'a contract made touching the land' and 80 'conveying the same,' within the spirit of the law, and was, therefore, null and void. * * * The lease in question was made in violation of a positive statute of the United States, and, therefore, the courts will not aid the parties in enforcing it. Nor will they grant relief when its terms have been violated. The lessees had no right on the allotted land of Robert L. Williams, and they planted and cultivated the crops at their own peril. For their destruction, they cannot recover damages. * * * The corn had not been harvested, and a suit for damages for its destruction necessarily involves the legality of the lease."

In *Kelly v. Harper*, 7 Ind. Ter. 541, 104 S. W. 829, a question quite like the one in the case at bar was involved. Harper, a white man, contracted to sell Kelly, another white man, a tract of Indian land, the payment to be made when Harper could "secure possession and same is allotted." The court held the contract absolutely null and void and in so doing, said:

"There is no provision for any such sale as called for by the contract in this case, and, therefore, the contract sued on was void. Until the land was allotted, and the period of restrictions upon alienation of one, three, and five years had expired, a person who is not a citizen of an Indian tribe has no authority to purchase or sell Indian lands. * * * Inasmuch as the contract sued on was void, the complaint did not state a cause of action, and the demurrer should have been sustained."

In *Sayer v. Brown*, 7 Ind. Ter. 675, 104 S. W. 877, Sayer, a white man, made an agreement with Brown, an Indian, to secure title to Indian lands which he, Brown, could hold under an agreement that when the restrictive period expired Brown should deed him a half interest therein and advance \$600 on the contract. The court held the agreement unenforceable, saying:

"If the sale of this land were a lawful one, and the contract 81 between the parties not in violation of law, there is no question but that a court of equity would enforce it. But it was forbidden by the statute, and was against the policy of the Government, and, therefore, void. * * * 'No principle of law is better settled than that a party to an illegal contract can not come into a court of law and ask to have his illegal objects carried out, nor can

he set up a case in which he must necessarily disclose an illegal purpose as the ground-work of his claim.' * * * (9 Cyc. 546.) The rule is so well established and known as to have become elementary. But there are some exceptions to the rule, generally grouped by the text-writers into five heads: (1) When public policy requires the intervention of laws. * * * And (5) where the party complaining can exhibit his case without relying upon the illegal transaction. Here the very foundation of the suit is the illegal contract."

It will be noted that the appellee herein, like Sayer, can not exhibit his case without relying upon the illegal contract.

In *Dupas v. Wassell*, 1 Dill. 213, Fed. Cas. No. 4182, Judge Caldwell held that a squatter on the Hot Springs Reservation which the Federal statute provided "shall be reserved for the future disposal of the United States and shall not be entered, located or appropriated for any other purpose whatever" could not recover upon a lease of the portion of the Reservation which he had unlawfully settled upon, saying:

"Every agreement that parties may make does not, in law, amount to a contract having a binding obligation. Contracts to do an illegal act, and contracts against good morals and public policy are void; and the law will not lend its aid to either party to such a contract to compel its performance or enforce any right claimed under it. Leases are not exempt from the operation of this rule. * * *

82 The Reservation was not public lands in the ordinary and common acceptance of these words. These lands could not be entered, located or appropriated for any purpose whatever. This was the law when the plaintiff 'squatted' on them. He was a trespasser and might have been criminally punished for his trespass. He had no right and could acquire no right to treat this Government property as his own; and in attempting to do so, he was acting in violation of law; and any lease he may have granted to any portion of the Reservation was utterly void."

The doctrine so laid down by Judge Caldwell was recognized in this court, and the *Dupas* case cited as authority in *Mayer v. Live Stock Association*, 58 Kansas 712, wherein it was held that no action could be maintained upon a lease of Indian lands prohibited by law. It is true that under ordinary circumstances a person contracting to sell land of which he is not the owner becomes liable for damages for breach of such contract, but why? One reason is that under the circumstances he is ordinarily estopped from denying ownership. It is a thoroughly well established principle, however, that estoppel cannot be based upon an illegal contract. Applying this principle it was held in *Light v. Conover*, 10 Oklahoma, 732, 63 Pac. 966, that a tenant under a void lease on Indian land could not be held liable for rent. The court said:

"But it is contended by the defendant in error that the defendants were tenants of the plaintiff, and used and occupied the land, and, therefore, are estopped from denying the plaintiff's title, or to question the legality of the lease. We think not. The written lease, as well as the parol agreement, were not only contrary to public policy,

but were entered into in violation of a positive statute, and hence the doctrine of estoppel does not apply."

The case of Muskogee Land Co. v. Mullins, 165 Fed. 179, 83 91 C. C. A. 213, is in point on several propositions herein.

There the Land Company held the premises under a lease from the allottees who had a right to lease the land for agricultural but not for grazing purposes. Mullins leased from the Company and when the lessor sued for rent claimed that the original lease from the Indians was void because it was, in fact, made with the intention to graze and not to farm the land. The court held that Mullins might, by parol proof, dispute the terms of his own lease to show its real purposes and that he was not estopped to dispute the title of his landlord, using this language:

"The land company held the premises under some kind of right derived from allottees of the Creek Nation. * * * It made a lease to Mullins, on its face purporting to be for agricultural purposes. * * * On this controlling issue of fact the writing is not conclusive. Parol evidence is always competent to show that a written contract, fair and lawful on its face, is in truth, contrary to law, morals, or public policy. * * * If the lease now in controversy between the land company and Mullins was not authorized by the owners of the land the Creek citizens, in their contract with the land company, it was unwarranted, and constituted a violation of the spirit of the Act of Congress in question. If it was authorized by them it constituted a violation of the letter of the law and is void. No mere circumlocution can be permitted to accomplish an ulterior and unlawful purpose. The general rule invoked by the land company prohibiting a tenant from denying the title of his landlord has no application to this case. * * * Nothing can be plainer than that an intentional violator of the law cannot invoke the equitable principle of estoppel for the purpose of protecting him in such violation. Defendant, therefore, is not estopped from denying the validity of his landlord's title, or from asserting the invalidity of his contract as actually made with the land company."

84 Another way of stating the question involved herein is to say that the law will not enforce a contract to sell property which is not a legal subject to barter and sell. It was accordingly held in *Lamb v. James*, 87 Tex. 485, 29 S. W. 647, that a contract to sell public lands, the title to which could be acquired only by settlement and residence, was void. The court said:

"The public lands are not a lawful subject of a private contract, and an attempted conveyance thereof by one private person to another passes no interest whatever in the land, and does not create the relation of vendor and vendee, and, therefore, cannot be held to furnish a consideration for the payment, the promise of payment, or the recovering of the supposed consideration of such conveyance."

Numerous other decisions by this and other courts applicable to this question are referred to in the dissenting opinion by Mr. Justice Benson in this case.

The power of any two white men to create a binding contract by agreeing to convey Indian lands before the restrictions upon the con-

veyance of such lands have been removed involves a Federal question which is reviewable by the highest Federal court. The policy of the Federal Judiciary upon such questions should govern in this court the same as the decisions of this court upon the effect of a Kansas statute would the Federal court. Upon the general Federal policy of making the restrictions of the Act of February 8, 1887, thoroughly effective, Judge Sanborn remarked in *Beck v. Flournoy Company*, 65 Fed. 30, 12 C. C. A. 497:

"The motive that actuated the law makers in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain as to leave no room for
85 doubt that Congress intended to put it beyond the power of white men to secure any interest whatsoever in the lands situated within Indian reservations that might be allotted to Indians."

III.

The case of *Robertson v. Talley*, 84 Kan. 817, is not in point herein.

As we understand it the decision herein rests chiefly upon the general doctrine enunciated in the above case that one who agrees to sell land becomes liable for damages for failure to convey regardless of the ownership of the property when he made the contract. This is undoubtedly the correct rule provided the land was legally subject to sale at the date of the contract, but if it can not be legally sold then the contract requires the party to do an impossible thing which makes it void, and in the case at bar it also requires the doing of a thing forbidden by law, which, under the authorities already cited avoids any contract relative to Indian lands made prior to the removal of the legal restrictions upon their sale. While the case of *Robertson v. Talley*, supra, held that, generally, one having no title to property may bind himself personally to convey it. The subject of his knowing at the time he could not acquire title to it was not therein considered. On the contrary, the plain inference is that Talley supposed he could procure the title. The court says:

"No reason is apparent why he may not bind himself personally by a contract that he will procure a deed to land, although he is not certain that he will be able to do so."

An examination of the other authorities cited in the opinion herein shows that in neither of them was there any question
86 of public policy, mutual mistake of fact or law, or knowledge by the parties that the party proposing to sell could not acquire the title.

In *Krhut v. Phares*, 80 Kansas, 515, the party contracting to sell had a valid and enforceable contract with the owner of the property of which this court said in its opinion, at page 517:

"It gave the plaintiffs control of the title so that they could demand and compel a conveyance and so secure title to themselves, and thereby, if they desired, secure title to another. Being in a situation to enforce a conveyance by the owner, they were in a position to make a binding contract themselves to convey."

The distinction between that and the case at bar is obvious. Sage was not "in a position to enforce a conveyance by the owner," but on the contrary the owners were in a position that they could not make a conveyance, hence any agreement looking to a transfer of the title to Hampe through them was an agreement to do a legal impossibility. The decision in *Provident Loan and Trust Co. v. McIntosh*, 68 Kansas, 452, the remaining case cited in the opinion on this question, was placed squarely upon the ground that the party making the agreement to convey had control of the title. The third paragraph of the syllabus reads:

"A man having an interest in land, and having such control of its title that he may require a conveyance of it, may rightfully make a contract in his own name to convey it by a warranty deed, without disclosing the actual state of the title to the purchaser."

We, therefore, respectfully assert that the question involved herein was not considered nor decided in either of those cases. This case is distinguishable because not only the party contracting to sell, but also the proposed purchaser knew that he could not convey, since both must be presumed, in the absence of any misrepresentation by the other, to have known the law.

IV.

The memorandum fails to contain such a description of the Oklahoma land as can be made definite and certain.

This memorandum reads: "760 acres in Pottawatomie county, Oklahoma." The effort to aid and make it certain, was as follows:

1st. By a liberal interpretation so as to read into it "owned by me" (Sage). But how could this be done when the proof shows he did not and could not own the land, and why should it be done when the opinion holds that it was not necessary that he should own it?

2d. The next step at aiding the memorandum was to go beyond it by averring in the petition that "said tract of land was the only land in Pottawatomie county, Oklahoma, which said defendant then owned," etc.

This presents the novel doctrine that the scope of the proof, in aid and explanation of the language of the memorandum, may be enlarged by first amplifying its terms by the pleading and then supporting the enlarged terms by parol proof. It seems a sufficient argument upon this, merely to state the proposition. If this is to become the rule what, except the scope of the anticipated and desired parol testimony, shall fix the limits of such pleadings?

3d. The next step after so enlarging the memorandum by construction and then by additional averments in the petition, was to let in parol testimony that can not be justified by a correct analysis of the transaction nor supported by any standard authority. We ask no better statement of the true rule than the opinion in this case affords, viz:

"While it is always competent to offer parol evidence to identify the description, it is never admissible for the purpose of supplying a description which the parties have omitted from the writing."

Now did not the plaintiff proceed to do the very thing this statement of the rule forbids, viz: supply both the description and its identification? This is what was done. Proof was admitted to show, (a) That some time previously Sage had shown one Hewins 760 acres in Pottawatomie county, Oklahoma, stating that he owned it and that it was all the land in Oklahoma he did own. (b) Oral declarations by Sage to Hampe that he had reference in the agreement to the land he had shown to Hewins. (c) That Sage at some other time, in some other transaction orally declared to Shillinglaw and Moffitt, real estate agents, that he owned 760 acres in Pottawatomie county, Oklahoma; that it was all the land he owned in that State, and that he desired to sell it. (d) That Shillinglaw and Moffitt entered up such description as he gave, in a book they kept for listing lands, which entry was unsigned by Sage and contained no reference to the memorandum, nor the memorandum to it. All this was clearly violative of the foregoing rule which we say correctly stated the law, but which was misapplied to the facts in this case. The same rule was stated in the former decision herein. (Hampe v. Sage, 82 Kansas, 728, 733), thus:

"Parol evidence is admissible to apply the description, but not to supply it."

Chancellor Kent in his observance on the requirements of the statute in 2 Kent's Comm. 511, says:

"Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischief which the statute of frauds and perjuries was intended to prevent."

The same doctrine is stated in *Halsell v. Renfro*, 14 Oklahoma, 674, 78 Pac. 118, 3 Am. and Eng. Ann. Cas. 287, as follows:

"Where a sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given or where there is no description, such evidence is inadmissible. A court will never receive parol evidence both to describe the land and apply the description."

Now we say that is just what was, in fact, done in this case. The memorandum contained neither a description sufficient to identify the property nor a reference to any extrinsic document or other source of information from which the description of the land might be obtained. We say that the application of the rule adopted herein makes it possible by perjured parol proof to hold a party liable for the breach of a contract to sell land which he never had in mind when he contracted in writing and never intended to sell. To make this absolutely clear we submit this illustration: Suppose a member of this court, after securing an option to purchase a quarter section of cheap pasture land in the sand hill region of Finney county, worth \$500, offered to exchange the same to Mr. Hampe for a typical trading stock of shop worn shoes and antiquated millinery, invoiced at \$8,000, but actually worth \$800. Mr. Hampe

accepts the offer and Mr. Hewins draws a contract which is signed by the parties and provides:

"Mr. Justice — agrees to sell to Mr. Hampe 160 acres of land in Finney county, Kansas, for \$8,000, and Mr. Hampe agrees to sell to Mr. Justice — a stock of shoes and millinery now kept at — for \$8,000."

Ten days later Hampe tenders the goods and demands a deed of conveyance to a quarter section of irrigated sugar beet land adjoining Garden City, worth \$16,000, and when his demand is refused brings suit for breach of contract, alleging that the sugar beet land was the tract referred to in the memorandum; that the same had been shown to his agent by the defendant and was the only land in Finney county which the defendant owned. On the trial Hampe produced witnesses who swear that Mr. Justice — showed Hewins, the agent, the sugar beet land; that he listed the same with Shilling-law and Moffitt for sale, stating he owned no other land in Finney county; that they entered the description of the property on their books and such entry is received in evidence. The defendant pleads and offers to prove that he never owned the sugar beet land, but the court reads the words "owned by me" into the contract and rejects proof offered for that purpose and for the reason that it is immaterial whether he, in fact, ever owned the property. The jury believing

Hampe's witnesses awards him damages for \$15,200, the difference between \$800, the actual value of the merchandise, and \$16,000, the value of the irrigated farm. The defendant clearly never contracted to sell the sugar beet land. The proof that he did so rests wholly on parol and perjured testimony. The description of the land is both supplied and applied by proof outside the memorandum and not therein referred to. Now we ask, under such circumstances, was not the defendant held liable upon parol proof alone for the breach of a real estate sale contract which he never made? By such an application of the rule is it not possible at any time to make any member of this court or any other citizen liable for damages to the full value of the best quarter section of land in any county in the State provided he can be inveigled into signing an agreement to sell "160 acres of land" in any stated Kansas county without more definitely describing it, having in mind at the time the poorest quarter section in the county, provided the other party to the agreement can secure enough perjured testimony to convince a jury that he actually intended to sell the more desirable tract. To promulgate such a rule in this State is to adopt an innovation which will, in many instances, utterly destroy the objects of the statute. Such an application of the rule would, in the language of Chancellor Kent, *supra*, "at once introduce all the mischief which the statute of frauds and perjuries was intended to prevent." It must be remembered the statute is leveled not only at frauds but perjuries as well. There must be enough in the memorandum itself to set the bar firmly against all reasonable uncertainties. A construction of the law that will permit a too indefinite memorandum to be pieced out by parol testimony is a powerful bid for perjury. No court seems to perceive or state the rule more clearly

than this, but the trouble comes with its application in this case to facts which cannot be reconciled with any statement or application of the rule or its reason that we have been able to find. To show how carefully the rule is stated and applied with the idea that the memorandum must contain enough to unerringly guide to a description certain, to the exclusion of all other lands, and how jealously, and with what unanimity the courts and text writers have excluded and pointed out the danger inhering to outside proof, even when in writing, we cite a few of the most undoubted sources of the law:

"The subject matter of a contract falling within the statute of frauds must be so described in the memorandum as to be capable of certain identification. * * * In general the description of the land in the memorandum of a contract for the sale of lands must be sufficiently definite to identify the land by its own terms or by reference in it to external standards in existence at the time of the making of the contract and capable of being determined beyond dispute." (20 Cyc. 270.)

"Two or more papers properly connected may constitute a sufficient memorandum such, for instance, as a series of letters all showing that they relate to the same subject matter of the contract. In general if but one of the several papers is signed only such of the others as are referred to in it may be taken to constitute a part of the memorandum." (20 Cyc. 278.)

"But if it be necessary to adduce parol testimony in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the contents of the signed paper to show a reference to or connection with the unsigned papers then the several papers taken together do not constitute a memorandum in writing of the bargain so as to satisfy the statute." (1 Benjamin on Sales, 4th Amer. Ed. Sec. 220.)

"The connection between the signed and the unsigned papers cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum." (Johnson v. Buck, 35 N. J. L. 338.)

Appellee's whole case rests on a flagrant disregard of this plain and well established rule of evidence. They supplemented the writing signed by Sage by the written memorandum contained in the real estate agent's books, and in order to do so proved, by parol, that they both referred to the same property. There is not a word of reference in either the signed or the unsigned memorandum to the other. We respectfully submit that the memorandum entered on the books of the real estate agents, not signed by the party charged and purporting to be nothing more nor less than a record of what appellant said, was incompetent for any purpose. It was introduced and read to the jury over the strenuous objection of appellant's counsel. (Pp. 12a, 12b.) The error in receiving such proof was so material and prejudicial that it alone calls for a rehearing and a reversal of this case. The condition under which an unsigned memorandum may be received in evidence to aid in the interpretation of the signed

contract is stated in the American note in Bennett's 6th Amer. Ed. of Benjamin on Sales at page 209, as follows:

94 "On the other hand, if only one paper be duly signed, no other unsigned paper can be considered unless it be in some way referred to in the signed paper; oral evidence alone to connect them will not suffice. The signed paper must incorporate and draw down into itself the unsigned one; otherwise there is no complete memorandum "duly signed," etc. *Moale v. Buchanan*, 11 Gill and J. 322; *Frank v. Miller*, 38 Md. 461. It is not enough that the unsigned paper, if unannexed to the signed one and not referred to in it, refers to the signed one; for an unsigned paper would be only like oral additions to the signed document, and all the evils would exist which the statute was designed to avoid. This distinction it is important to keep in mind."

The syllabus in *Ridgway v. Ingram*, 50 Indiana, 145, reads as follows:

"A memorandum, in order to make another writing a part thereof, so as to constitute a part of the contract, must refer to such other writing, and parol proof of the connection of the papers is not admissible to establish a contract required by the statute to be in writing."

The language of the syllabus is supported by the opinion and numerous authorities cited therein. An attempt was made in *Frank v. Miller*, 38 Md. 450, as in the case at bar to supplement an imperfect memorandum signed by the party by other unsigned writings connected therewith only by parol testimony. The court said:

"To supply the defects in the memorandum, and show the subject-matter of the contract, the plaintiffs offered in evidence the two notes of *Katzenberg & Co.*, described in the declaration; but that was alike inadmissible; they are not signed by the defendant, nor in any manner binding upon him; no reference to them appears in the memorandum, and it is impossible to connect them except by parol proof, and to allow that to be done, would be an evasion of the statute, and would open the door to the very mischiefs the statute was intended to prevent."

95 In *Shannon v. Widsom*, 171 Ala., 55 So. 102, 103, the court said:

"Contracts for the sale of lands must describe the lands with such certainty that they can be identified without resorting to oral evidence. While the writing need not give a technical description of the lands contracted for, it must contain facts sufficient to identify them. If it is necessary to resort to oral evidence of the intention of the parties as to the lands bargained for, the writing is not sufficient, and the statute is not complied with. It is the exclusion of parol evidence as to these important matters that the statute is intended to accomplish."

We now call particular attention to a case, *Price v. Hays*, 143 Ky., 139 S. W. 810, most strikingly similar on the facts to the one at bar, where an exchange of lands was contracted for in writing. The terms were given much more fully than in this case, but one of the properties was too indefinitely described, and it was sought, as in this case, to broaden it by an amendment to the petition and then support

the additional averments by parol evidence. The description in the contract was: "About 150 acres of land near Otter Creek station, one mile north of Rineyville, Hardin county, Ky., on I. C. R. R.; said land to be valued at \$25 per acre." It was also understood that, if the land came to more than \$5,000, the price of the houses and lots, appellant was to pay appellee therefor at the rate stated, \$25 per acre. The court said:

"Appellant filed this action to recover damages from appellee for his failure to comply with his part of the contract. It is alleged that appellant complied with all the conditions required of him; that appellee has sold the land to another person for \$35 per acre; that by reason of the sale it is now out of his power to comply, and
96 avers that the value of the land is \$35 an acre, and seeks to recover as damages the difference between \$25 per acre, the contract price and \$35 per acre, the alleged value of the land. Appellant alleged by an amended petition that appellee, at the time the contract was made, was the owner of only this 150 acres of land lying near Otter Creek station, one mile north of Rineyville, in Hardin county, Ky., and that he has owned no other since. The court sustained a demurrer to the original and amended petitions, upon the ground, as stated, that the writing did not contain a sufficient description of the land to legally bind appellee to perform the contract.

Writings containing similar descriptions of land have been before this court repeatedly for construction. The object of the statutes of frauds and perjuries is to prevent the evil arising from parol testimony in so far as certain subjects were concerned, particularly that of land. The evidence as to what lands are the subject of the contract must be contained within the contract. The writing or memorandum must itself afford the means of identification; and unless it does, it is within the statute of frauds. * * * The appellee does not refer to the land as his, or as his home place. He simply agrees to convey about 150 acres of land near Otter Creek station. No words are used in the writing to give a starting point, nor is the description sufficient to authorize parol proof to aid in identifying the land. It is true appellant stated in an amended petition that appellee owned only one tract of land near the place named; but this idea is not gotten from the writing. There was nothing therein to indicate this fact, or that he owned no other land in that vicinity. There are many authorities upon this question, some of which are cited in the case referred to, and we conclude from them that the lower court did not err in sustaining the demurrer to both the original and amended petitions."

The last paragraph of this opinion states clearly and unequivocally the reason why the plaintiff, Hampe, is not entitled to recover in his action against Sage. Hampe amended his petition by alleging that at the time of the contract Sage was the owner
97 of only this 760 acre tract. Relative to such an allegation the court in the last paragraph above quoted, says:

"But this idea is not gotten from the writing. There was nothing therein to indicate this fact, or that he owned no other land in that vicinity."

In McCarn v. London, 83 Neb. 201, 119 N. W. 251, the contract was:

"Fremont, Nebraska, March 21, 1907. Received of Esther London fifty dollars (\$50) to apply on payment on sale of the north — feet of lot No. 8, B'lk No. 182. Esther London agrees to pay for this property \$1,250 in all, \$550.00 cash June 15, '07, \$600 cash Aug. 1st, 1907, with 6 per cent interest from April 21, '07, when Esther London is to get possession. Nanette E. McCarn."

The court said:

"It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute. * * * The connection between the signed paper and the external standards cannot be made by parol. It must appear or be reasonably inferred from the writing itself. * * * The contract fails to identify the property, and there is no reference to any external standard. The only way to ascertain what was in the minds of the contracting parties is to resort to parol testimony of what was said between them, which would, in effect, nullify the statute requiring the contract to be in writing."

In an important case, Bogard v. Barhan, Ore., 96 Pac. 673, the court holds that the description in the memorandum must be such that a surveyor armed with it may, without the aid of parol testimony, and by the writing alone or only aided by proper extrinsic evidence, definitely locate the land to the exclusion of all other land, and added that any such extrinsic evidence must not "dispute nor add to," etc. Applying this rule here it will be seen that a surveyor armed with the description of the land set forth in the memorandum could not, with the aid of any proper extrinsic evidence, have gone to Pottawatomie county, Oklahoma, and found the land. His starting point would necessarily have been the records of the county showing the allotments, if any such records were kept there, and upon an investigation thereof he would have found that Aaron Sage owned none of the property in question. If he had gone further and made inquiry in the neighborhood he would have found no land that anybody recognized as the property of Aaron Sage. The evidence, therefore, which was adduced to prove such ownership, viz: the memorandum of the real estate firm, proof of Sage's statements when the memorandum was made and the testimony of Hewins about his visit to Oklahoma was all clearly inadmissible for the reason that it both disputes and adds to the agreement.

Another very important and instructive case is that of Schreck v. Moyle, 94 Miss. 259, 48 So. 513, wherein the memorandum read:

"In consideration of \$50.00, I hereby give R. T. Schreck a fifteen day option on 22,000 acres of timber land in Franklin and Jefferson counties, Mississippi, at \$12.50 per acre.

J. L. MOYSE.

Attest:

S. D. WILKINSON."

9-23-'07.

We will furnish a man to show parties the property.

J. L. MOYSE.

Attest:

S. D. WILKINSON."

It will be noted that the memorandum states that "we will
99 furnish a man to show parties the property." In that case,
as in the one we are considering, the petition undertook
to add to the memorandum. The court says:

The declaration contains three counts, and states substantially
that this option was given by appellee, and that it was understood
verbally between the parties that certain named tracts of land were
referred to, one lying in Franklin and the other in Jefferson coun-
ties; that appellant paid \$50 for the option, and expended con-
siderable sums in having the lands examined and the timber esti-
mated; that he had secured a purchaser, who would buy the lands
at an advance over the purchase price of \$1.50 an acre; that appellee
did not own the lands at the time the option contract was signed,
and had either failed or refused to secure the same; that there was a
failure to deliver the lands, * * * and that by losing the oppor-
tunity to make a re-sale appellant had been damaged to the extent
of \$33,000; this being at the rate of \$1.50 per acre on 22,000 acres.
To this declaration a demurrer was interposed, and sustained, on
the ground that the option memorandum is void under the statute
of frauds, since there is no sort of description of the property. It
is obvious that the memorandum does not satisfy the statute, and
equally obvious that parol testimony cannot be resorted to in order
to supplement the deficiencies in the written memorandum. In-
deed, appellant practically concedes that specific performance of
the contract could not be enforced; but it is claimed that it may
form the basis of a suit for damages. We may dispose of this con-
tention by saying that the only damages sought to be here recovered
are the profits on a re-sale, and that these are not recoverable, ex-
cept in a common-law action for fraud and deceit. The declaration
in this case was manifestly not drawn on this theory, since there is
utterly lacking every averment essential to such an action. The
rules both of pleading and evidence governing this class of actions
have lately been reviewed by this court in the case of *Vincent v.*
Corbitt, 47 South. 641, and need not be here repeated. The suit is
clearly not such an action."

100 This opinion shows that the purchasers expended con-
siderable sums in having the land examined and the timber
estimated, which fact also shows that the seller carried out that
part of the contract which agreed to furnish a man to show parties
the property, and yet the court held that the description was in-
sufficient and that parol testimony could not be resorted to in order
to supplement the deficiencies in the written memorandum.

The memorandum in this case does not state that Sage owned
the land but it is suggested in the opinion that such implication
may properly be read into the agreement. This was done for the
purpose of enabling the memorandum given to Shillinglaw &

Moffitt, the real estate agents, describing the land he wished them to sell to be introduced as a connecting link, and also to connect up with the testimony that Sage had shown certain land to Hampe. Since it transpires that Sage did not own the land then it cannot help the identification but weakens it, in fact, destroys it, to read into the contract by implication "my land." This amounts to nothing more nor less than the supply by parol testimony of one of the essentials of the memorandum, viz: the description of the land. It is not amplifying a description contained, it is wholly supplying a description. Suppose that instead of showing the land to Hampe he had shown him a map or plat or chart, or even a deed describing the land, unless such memorandum had been signed by him, upon what principle without violating these established rules and letting in all the mischiefs that they are intended to avoid,

101 could such collateral and disconnected memorandum be introduced? We submit that if such deed, plat or map unsigned or unREFERRED to could not be introduced then the act of showing him certain land would be no more nearly competent, because necessarily it would depend purely on parol as to what land was shown and as to what was said? How could Hewins know even when shown the land that it contained 760 acres other than by the parol declarations?

If the memorandum signed by Sage had in some manner other than by the number of acres alone designated the land so that it could be followed and supplemented by parol testimony to show what land was meant and that such would be the only land that could have been referred to it might by proper parol evidence be made certain. If for instance, had he added such a designation as the "Buck Horn farm" or "Slate Creek farm" such designation would have placed a limitation upon the mere acreage designation and would have prevented its application to any other similar acreage which would be equally consistent with the memorandum except for the further characterization of "Buck Horn" or "Slate Creek" farm. If the 760 acres designated in the memorandum had, in fact, belonged to Sage then there would be some further certainty obtainable by reading into the memorandum "my," provided it could also be shown that he owned no other 760 acres to which the word "my" could refer, but it transpires that he did not own any 760 acres hence the word "my" could not be limited to any particular tract of that acreage, but in this case they went out into the realm of speculation and guesswork, and found where Sage had at another time in a disconnected and collateral deal given a

102 description of a like number of acres and it then was inferred by the court that this was the particular land to which the word "my," read into the memorandum, could be made to refer. Now we submit that upon principle and authority such collateral memorandum made by the real estate agents, testified about by them, was purely parol, and if it should be taken as evidence at all it would necessarily relate to land which he did own or claim to own when, in fact, the testimony in this case shows that the memorandum referred to a 760 acre tract which he did not own.

In the illustration set forth in the above the descriptive terms, "Buck Horn" and "Slate Creek" would, with a great and sufficient degree of certainty confine the supplementing parol testimony to the particular tract so designated, and thus enable it to apply instead of supply the description. Whereas in the case at bar had he described a different tract of land to the real estate agents then that would have been the tract read into this memorandum, therefore, we say, that the designation in the memorandum in this case wholly failed to meet the idea of exclusion of other lands, within both the rule and its reason.

To further illustrate by giving an instance in which the very same character of testimony that was used in this case could be made to refer to any tract of similar acreage we suggest that if "A", conceiving the idea of getting an offer from "B" for a quarter section of land in Woods county, Oklahoma, at a price that would enable him to buy almost any tract in the county and sell it to "B" at a profit, 103 should sign such a memorandum as they used in this case and should for some reason fail or refuse to perform, and "B" should sue him for breach of the contract and should ascertain that at some other time in dealing with some other party "A" had offered to sell a particular piece of land and described it, under the relaxation of the rule permitted in the case at bar, such collateral description, made at another time and for another purpose, and even unsigned could be made to become, in legal contemplation, the land had in mind by "A" at the time he made his agreement, when in fact, he had no particular land in mind. And in such an instance suppose that after having admitted such testimony it should transpire that "A" had given numerous and varied descriptions of land as belonging to him of similar acreage and in the same county in Oklahoma, the absurdity and uncertainty of admitting such collateral testimony would appear. Now take it in the case at bar, suppose it had appeared in the same book shown by the real estate agent or by some other book of some other real estate agent that Sage had described 760 acres of other land in Oklahoma as owned by him, unsurmountable uncertainty and confusion would thus be introduced, whereas had the memorandum been more nearly complete by containing some limitation upon the numerous bodies of land in the same county that might have answered to the description merely by acreage such as "Buck Horn" or "Slate Creek farm" then there would have been such certainty in the memorandum as would enable the parol testimony to make it certain. We most confidently insist, therefore, that the designation in this memorandum might, with equal certainty, 104 under the same class of testimony, be made to apply to an almost unlimited number of similar acreage tracts other than the one finally fixed upon.

In *Hollis v. Burgess*, 37 Kansas 487, the land is described as the Snow farm. This court referring to this description held:

"If the designation is so definite that the purchaser knows exactly what he is buying, and the seller knows what he is selling, and the land is so described that the court can, with the aid of extrinsic evi-

dence, apply the description to the exact property intended to be sold it is enough."

It is easy to understand that the words "Snow Farm" enables parol testimony to be used to apply the description provided there was only one "Snow Farm", but suppose there were two "Snow" farms or several "Snow" farms in the same county would it not violate the very essence of the rule to permit oral testimony that the defendant having shown one of the "Snow" farms to some one at some time and stated that he owned it, and upon such proof alone hold him bound, under his contract to convey that particular farm? In the leading case of *Ryan v. U. S.* 136 U. S. 68, 10 Sup. Ct. 913, it is held that the memorandum must contain such a definite description as will permit extrinsic evidence to be "applied to the very property intended and to the exclusion of all other." That rule, we submit, was violated in this case, because the description "760 acres located in Pottawatomie county, Oklahoma," is applicable to several hundred different tracts of land alike, hence it is not sufficiently definite to be "applied to the very property intended and to the exclusion of all other."

105

V.

Insufficient Description of the Kansas Land in the Memorandum.

This question appears to have been overlooked. It is not mentioned in the opinion. The description contained in the memorandum is as follows:

"Seven hundred and sixty acres located in Pottawatomie county, Oklahoma."

The trial petition alleges that on the date of the agreement appellee owned "a certain tract of land in Shawnee county, Kansas, described as follows: All of that part of the Southeast quarter of Section 11, Township 12, south of Range 15, east of the sixth principal meridian, lying south of Shunganunga creek, containing something more than 81½ acres." (pp. 1 and 2,) "being the only tract of farm land then owned by him." Pp. 3 and 4.) We submit that even under the liberal rule laid down in this case on its first hearing the petition was still demurrable at the time of the last trial, because it did not allege that the tract of "something more than 81½ acres" of "farm land" referred to was the only tract filling the description in the memorandum. True, he alleged he owned no other farm land, but so far as the petition discloses he may have owned a tract of grazing land containing exactly 81½ acres, another tract of timber land, and still another of mineral land, each containing the precise area called for by the contract. Therefore, under the rule announced in *Hampe v. Sage*, 82 Kansas 728, the trial petition was, as to its allegations concerning the Kansas land, as defective as it was before the

106 amendment as to the Oklahoma land. The identity of the Kansas property is not nearly so clearly proven as that of the Oklahoma land. The latter is said to be (which we do not concede,) identified by the memorandum on the real estate agent's book. The former is identified only by the parol testimony of Mr. Hampe. (P.

12a.) The insufficiency of the description of the Shawnee county property contained in the memorandum was duly challenged (1) by the fourth paragraph of appellant's answer (p. 10), (2) by a demurrer to the evidence (p. 14), (3) by the 1st, 2d, 3d and 10th instructions requested and refused (pp. 23, 24 and 28,) (4) by the motion for judgment (p. 34) and (5) by the motion for a new trial (p. 35). All we have hereinbefore said relative to the insufficiency of the description of the Oklahoma land applies to the description of the Shawnee county property. In addition to that there is the want of sufficient allegations in the petition to make the description of the Shawnee county land good under the doctrine of the first opinion herein, and the fact that the tract which Sage was mulcted in damages for refusing to accept under his written agreement contains "something more than 81½ acres" while the memorandum describes the property he agreed to buy as containing "81½ acres" and no more. So far as the record shows the tract for which deed was tendered may contain 100 acres instead of 81½ acres. Sage had agreed to pay for what he got at \$160 per acre. Was he bound to take more land at that price than the written agreement called for? Unless the memorandum, properly aided, was sufficient as to this Shawnee county description then the contract would not be mutually enforceable and plaintiff must have failed. This is elementary and needs no argument or authority.

"Where an executory contract consists of mutual promises both parties must be bound, or it will be void for want of mutuality." (3 Syl. Heiland v. Ertel, 4 Kan. App. 516.)

In the case at bar the parties thereto were not mutually bound and Sage could not have compelled Hampe to perform in an action for the specific enforcement of the contract for the reasons above stated. It follows that Hampe could not hold Sage for damages.

"The general rule of law is that, where the consideration for the promise of one party is the promise of the other party, there must be absolute mutuality of engagement, so that each party has the right to hold the other to a positive agreement. Both parties must be bound or neither is bound. 1 Parsons on Contracts, (7 Ed.) 448-452; Clark on Contracts, 165, 171; Southern Railway Co. v. Wilcox, etc., 98 Va. 222, 35 S. E. 355." (American Agricultural C. Co. v. Kennedy, etc., 48 S. E. 868.)

In conclusion we say to the court that we are impressed that the decision herein promulgates a dangerous rule tending to break down the safeguards afforded by the statute of frauds. We earnestly ask a rehearing that an opportunity for a fuller presentation of that and the other questions hereinbefore discussed may be made.

LEE MONROE,
W. S. ROARK,
CARR W. TAYLOR,
Attorneys for Appellant.

108 Be it further remembered, that afterwards on the 21st day of October, 1912, the same being one of the regular judicial days of the July 1912 term of the supreme court of the state of Kan-

sas, said court being in session at its court room in the city of Topeka, the following proceeding among others was had and remains of record in the words and figures as follows, to-wit:

109 In the Supreme Court of the State of Kansas, Monday,
October 21, 1912.

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Journal Entry Denying Petition for Rehearing.

Now comes on for decision the petition for a rehearing of this cause; thereupon it is ordered that said petition for a rehearing be denied.

110 In the Supreme Court of the State of Kansas.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas, do hereby certify that the above and foregoing is a full, true and complete transcript of the record and proceedings, in the case of George Hampe, appellee v. Aaron Sage, appellant, and also of the opinion of the court rendered therein, as the same now appear on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 17th day of December, 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,

Clerk Supreme Court of Kansas.

111 Here follow original petition for a writ of error, the writ of error and allowance thereof, the Journal Entry of Stay and Supersedeas, Specifications of Error, Citation, and a copy of the Supersedeas and Appeal Bond.

112 Supreme Court of Kansas.

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above en-

titled case the appellant, Aaron Sage, hereby prays a writ of error from the said decision and judgment to the United States Supreme Court and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

LEE MONROE,
W. S. ROARK,
CARR W. TAYLOR,
Attorneys for Appellant.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the above named appellant, Aaron Sage, in the sum of \$7,000.00; such bond when approved to act as a supersedeas.

Dated Dec. 3d, 1912.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

113 In the Supreme Court of the State of Kansas.

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Assignment of Errors.

Now comes the above appellant, Aaron Sage, and files herewith his petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case; and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Kansas erred in holding and deciding that the contract upon which the appellee, George Hampe, based his cause of action and which provided for an exchange of Indian lands situated in Pottawatomie County, Oklahoma, was a valid and binding contract, notwithstanding the fact that under and by virtue of the provisions of the Act of Congress, approved February 8, 1887, entitled, "An Act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians and for other purposes," it is provided that any conveyance or contract made, touching the said lands before the expiration of the period of twenty-five years mentioned in the patents issued and said Act of Congress, shall be absolutely null and void. Said act of Congress was in full force and effect and the twenty-five years from the respective dates of the patents thereunder had not expired at the time said contract for the exchange of said Pottawatomie Indian lands was made by the said Aaron Sage, appellant, and at the time this suit was instituted, and it was the contention of said appellant

that said act rendered the said contract of exchange of said Indian lands for land in the State of Kansas absolutely null and void, even if said contract contained a sufficient description of said
 114 lands (which appellant denied) upon which to base an action for damages under the statute of frauds.

The said errors are more particularly set forth as follows:

First. The appellee, George Hampe, commenced his action for damages against the appellant, Aaron Sage, upon the following contract, to wit:

"AUGUST 20TH, 1907.

"This is to certify, that on the above date, this contract made between Aaron Sage, party of the first part, and Geo. Hampe, party of the second part. Party of the first part agrees to take twenty dollars per acre for (760) seven hundred and sixty acres located in Pottawatomie county, Oklahoma, which amounts to Fifteen Thousand Two Hundred (\$15,200.00) Dollars. Party of the first part further agrees to take back a mortgage of six thousand dollars at five per cent. per annum. Party of the second part agrees to take (\$160.00) One Hundred and Sixty Dollars per acre for 81½ acres located in Shawnee County, Kansas, which amounts to Thirteen Thousand and Forty Dollars (\$13,040.00). Said party of second part further agrees to give said party of the first part a first mortgage of (\$6,000.00) Six Thousand Dollars, with interest at five per cent. per annum on said land located in Pottawatomie County, Oklahoma, these figures are thus in full:

Party of the first part.....	\$15,200
Party of second part.....	13,040
Balance due Aaron Sage.....	\$2,160
First mortgage on Hampe land.....	2,500
	<hr/>
	\$4,660
Interest on mortgage to January 1st, 1908.....	112
	<hr/>
	\$4,772
Amount of mortgage.....	\$6,000
Amount of mortgage and interest and difference.....	4,772
	<hr/>
To be cash from Sage to Hampe.....	\$1,228

Witness this 20th day of August, 1907.

AARON SAGE.
 GEO. HAMPE."

The appellee prayed for a judgment for his damages for the non-performance of the above contract on the part of appellant in the sum of Seven Thousand Six Hundred Fifty Two and 50/100 (7,652.50) Dollars, with interest thereon from the 16th day of October, 1908, at six per cent per annum, and costs.

The appellant denied all liability upon said contract, first, for the reason that said contract was not sufficient under the statute of frauds, and, second, pleaded the following defense:

"Second. And for a second answer to said amended and supplemental petition as amended, said defendant further says that the land described in said second amended and supplemental
115 petition as amended, as situated in Pottawatomie county, Oklahoma, was at the time of the execution of said alleged contract, as said plaintiff then well knew, Indian land allotted and patented to members of the Tribe of Pottawatomie Indians and not to this defendant under the provisions of the act of Congress approved February 8th, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territory over the Indians and for other purposes, copies of which patents are hereto attached marked Exhibit 'A,' 'B,' 'C,' 'D,' 'E,' and 'F,' and made a part hereof and in and by said act of Congress it is provided that any conveyance or contract made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents and said act of Congress, shall be absolutely null and void and defendant says that said period of twenty-five years from the date of said allotment and trust patent had not expired and had not been abrogated at the date of the alleged contract set out in a part of plaintiff's second amended and supplemental petition as amended."

The appellant also pleaded a general denial and to this answer attached the six patents as mentioned in said second clause of his answer as Exhibits A, B, C, D, E and F, showing all of said lands to be situated in Pottawatomie county, Oklahoma, said descriptions being as follows, to wit:

"1. The Southwest quarter of the Southwest quarter of Section 22, and the Southeast quarter of the Southeast quarter of Section 21, Township 7, North of Range 3 East, to Clark H. Sage.

2. The South half of the Northeast quarter, the Northwest quarter of the Northeast quarter and the Northeast quarter of the Northwest quarter of Section 21, Township 7, North of Range 3 East, to George J. Sage.

3. The North half of the Southeast quarter of Section 21, Township 7, North of Range 3 East, to Minnie Sage.

4. The Northwest quarter of Section 27, Township 7, North of Range 3 East, to Oliver Martelle.

5. The North half of the Southwest quarter and the Southeast quarter of the Southwest quarter of Section 22, Township 7, North of Range 3 East, to Fred-John-Sage.

6. The Southeast quarter of Section 22, Township 7, North of Range 3 East, to Eliza Sage.

And each patent, omitting the testimonium clauses and signatures naming the different allottees and different tracts, read as follows:

"The United States of America to all whom these present shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States, a schedule of allotment of land dated Sept. 15, 1891, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior, Sept. 16th, 1891, whereby it appears that under the provisions of the Act of Congress approved February 8, 1887, (24 Stat. 388), as amended by the Act of Congress of March 3, 1891, (26 Stat. 1019), Clark H. Sage—an Indian of the Citizen Pottawatomie tribe or band has been allotted the following described land: The Southwest quarter of the Southwest quarter of Section 22, and the Southeast quarter of the southeast quarter of Section 21, Town. 7, N. of Range 3 East, the Indian Meridian, Oklahoma Territory, containing eighty acres. Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of February 8, 1887, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions in said fifth section) for the period of twenty-five years in trust for the sole use and benefit of the said Clark H. Sage, or in case of his decease, for the sole use of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period."

These patents were dated Jan. 19, 1892.

Appellee's reply was an unverified general denial."

Second. That there is manifest error in the proceedings of the trial court in this, to wit:

In refusing to permit the appellee to testify in support of the second allegation of his answer above set forth, as follows, to wit:

"Q. Was all of this land allotted land?

A. Yes, sir.

Q. Had any fee simple patents been received for this land, or any part of it, from the government?

MR. HARVEY: To which the plaintiff objects as calling for incompetent and immaterial testimony.

THE COURT: I think this raises the question that was thrashed out before and I think this court, in effect, held before that it was immaterial about the fee simple title of this land, and I see no reason to change my views on that point, and will sustain the objection.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. Was any of this land deeded land?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent and irrelevant testimony.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

Q. Did you personally own any portion of this land?

Mr. HARVEY: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts.

The COURT: I think it is immaterial.

Mr. AUSTIN: I desire to make an offer to prove in this connection. I offer to prove by this witness that at the time of the execution of this alleged contract set up in the petition all of the land described in the petition as situated in Pottawatomie county, Oklahoma, was Indian land, allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under the provisions of an Act of Congress approved February 8th, 1887, entitled: 'An Act to Provide for the Allotment of Lands in Severalty to Indians of the Various Reservations and Extending the Protection of the Laws of the United States and the Territories over the Indians and for Other purposes,' which patents declares that the

United States does and will hold the land thus allotted for a
117 period of twenty-five years in trust for the sole use and benefit of said Indians, and that this twenty-five year period with respect to these particular lands had not yet expired or been determined or abrogated by the Government at the date of the contract set up as a part of plaintiff's second amended and supplemental petition as amended.

Mr. HARVEY: To which the plaintiff objects for the reason that it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any issue in the case.

The COURT: The objection is sustained.

To which ruling of the court the defendant at the time duly excepted and still excepts."

Third. The trial court further committed manifest error in refusing to give to the jury the following special charges and instructions tendered by the appellant, Aaron Sage, to wit:

"4. The jury are instructed that if they find that the real estate described in the petition of the plaintiff as the land defendant is alleged to have agreed to sell plaintiff is Indian land, allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under an act of Congress, under patents, which provided that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, and that at the time of the execution of the agreement sued on in this action, the said twenty-five year period had not expired and had not been abrogated, and that the plaintiff knew at the time

of the execution of said agreement that the real estate alleged to be referred to is the same as the land for which the defendant offered to take \$20.00 per acre was Indian lands allotted under Acts of Congress, he was chargeable with knowledge of the terms of said Acts and conditions under which the land was held, and can not charge the defendant with damages for his refusal to carry out the agreement sued on in this action.

Refused and excepted to.

A. W. DANA, *Judge.*

5. The jury are further instructed that the execution and delivery of the trust patents attached to the defendant's answer herein is admitted by the pleadings, and that the title to the real estate described therein continued by the legal effect of said instruments, to be held by the United States in trust for the period of twenty-five years from the date thereof, January 19, 1892, for the sole use and benefit of the allottee named therein, and that any conveyance or contract made by said allottee touching the said lands before the expiration or abrogation of said period of twenty-five years is absolutely null and void. The burden is, therefore, upon the plaintiff to establish that said trust period had been abrogated and that the defendant had become the owner of it legally or equitably at the time of the execution of the agreement sued on in this action, before he can recover in this action.

Refused and excepted to.

A. W. DANA, *Judge.*

6. The jury are further instructed that if the trust period of twenty-five years had not been terminated at the date of the agreement sued on in this action, the defendant was not the owner of the real estate described in the trust patents attached to the answer of defendant and the same cannot be regarded as the land referred to or intended to be referred to in said agreement. No oral representations or claims made by or control exercised by the defendant, over the lands described in these trust patents, can be considered for the purpose of identifying the land referred to or intended to be referred to in the agreement sued on in this action.

Refused and excepted to.

A. W. DANA, *Judge."*

118 Fourth. The trial court further committed manifest error in refusing to submit to the jury upon the request of the appellant, Aaron Sage, the following special questions of fact, to wit:

"Question No. 1. Was the Oklahoma land described in plaintiff's petition at the date of the execution of the agreement sued on in this action, August 20th, 1907, Indian Land allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under patents which provided that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to

whom such allotment shall have been made and which period had not then expired or otherwise terminated? Answer. —.

Question No. 2. Had the United States made any patent or conveyance of the Oklahoma land described in the plaintiff's petition at the date of the execution of the agreement sued on in this action, August 20th, 1907, other than the trust patents referred to in Question No. 1? Answer. —.

Question No. 3. Was the defendant, at the date of the execution of the agreement sued on in this action, August 20th, 1907, the owner of the Oklahoma land described in the plaintiff's petition? Answer. —.

Question No. 4. Did the plaintiff know at the date of the execution of the agreements sued on in this action, August 20th, 1907, that the Oklahoma land described in the plaintiff's petition was Indian land allotted and patented by trust patents to members of the tribe of Pottawatomie Indians and not to the defendant? Answer. —."

The trial court among other things instructed the jury as follows:

"Before you can find for the plaintiff in this cause you must find that the land described in his petition as situated in Pottawatomie county, Oklahoma, is in fact the land referred to in the written contract executed by plaintiff and defendant and attached to the petition in this cause, and that at the time of the execution of said contract the defendant owned no other land and did not claim to own or have control of any other land in said Pottawatomie county, Oklahoma, and that the land described in the petition as situated in Shawnee County, Kansas, is in fact the same land as that referred to in said contract, and that the plaintiff at the time of the execution of said contract owned no other land within Shawnee County."

Afterwards the jury returned a verdict against the appellant, Aaron Sage, and in favor of the appellee, George Hampe, for the sum of Two Thousand Six Hundred Forty-seven and 66/100 Dollars (\$2,647.66). Afterwards the appellant, Aaron Sage, filed his motion for judgment, notwithstanding the verdict of the jury, and also his motion for a new trial, which motions were both overruled by the court and judgment rendered in favor of the appellee for the amount of said verdict, to-wit, \$2,647.66.

5. Upon the appeal the Supreme Court of Kansas erred in holding and deciding that the said contract, set forth in the first paragraph of this assignment of errors, upon which the appellee's suit was based was such a contract as would sustain appellee's action for damages, and that said act of Congress, approved February 8th, 1887, (Chap. 119, 24 Stat. L. 389), providing that any conveyance or contract made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents shall be absolutely null and void, did not constitute a defense to said action, and affirming and sustaining the rulings and judgments of the lower court. The language of said court expressed in Section 3 of the syllabus so deciding being as follows, to-wit:

"The fact that the lands described in the memorandum were Indian lands held in trust for the allottees, who were members of the tribes of Pottawatomie Indians, and that under an act of congress and the terms of the trust patents issued for said lands, any conveyance or contract with reference thereto is declared to be absolutely null and void, will furnish no defense to an action for damages for breach of a contract by the defendant to sell and convey such lands."

The syllabus is by the court and is the law of the case as provided by Section 6188, General Statutes of Kansas 1909.

Sixth. The Supreme Court of the State of Kansas further erred in holding and deciding that the said contract for the exchange of said lands in Oklahoma for Kansas land, set forth in the first paragraph of this assignment of errors, upon which the appellee's suit was based and which is referred to and made a part of this assignment the same as though set out in full herein, was sufficient under the statute of frauds upon which to base appellee's action for damages, notwithstanding that said contract does not describe said lands in Pottawatomie County, Oklahoma, nor said land to be exchanged therefor in Shawnee County, Kansas.

Seventh. The trial court and also the Supreme Court of the State of Kansas further erred in holding and deciding that it was proper to allow appellee's petition to be amended so as to set out, describe and supply the description of certain lands in Pottawatomie County, Oklahoma, which were in fact allotted Indian lands not subject to contract, and lands in the State of Kansas, with the allegation
120 that they were the lands intended to be exchanged by the said appellant and appellee in said contract, thereby adding to and supplementing said written contract of exchange.

Eighth. That the Supreme Court of Kansas further committed manifest error in sustaining the lower court in its rulings admitting over appellant's objections certain incompetent, irrelevant and immaterial evidence for the purpose of sustaining said insufficient contract of exchange, to wit:

Plaintiff (George Hampe) testified that he was the owner of the land described in the petition as belonging to him and situated in Shawnee County, Kansas, and that he owned no other land in said county at the time of the execution of the contract as set up in the petition, and that at the time of making of the contract, as set up in the petition, said land was vested in him free and clear and unincumbered, except a mortgage for \$2,500.00, and that this was the same land that was shown and examined by the said defendant prior to the execution of the said contract; and that the title to the said land in Shawnee county remained in plaintiff as above stated until the time of the commencement of this action.

The plaintiff (George Hampe) examined as a witness in his favor Thomas G. Shillinglaw, who, over the objection of the defendant to each question and statement, that the same was incompetent, irrelevant and immaterial and an attempt to prove by parol a contract which is required by the Statute of Fraud to be in writing, which was over-ruled, the defendant excepting, testified that he was a

resident of the City of Topeka, Kansas, and engaged in the real estate business, making a specialty of the sale of farms and farm lands, and that a short time prior to the execution of the contract set up in the petition the defendant, Aaron Sage, called at his place of business and listed the lands described in the petition as being situated in Pottawatomie County, Oklahoma, as being for sale, and then and at that time stated that he owned said lands and did not own any other land in said Pottawatomie County, Oklahoma, and that the reason he wanted to sell it was that it was all the land he did own in said county and that he intended to get rid of it and get some nearer home, and that said lands were listed for sale with the witness as the property of the defendant and to be sold at \$20.00 per acre, and that said lands were still listed with him as above stated at the time of the execution of the contract as set up in the petition.

Also, George W. Moffitt, who, over the same objection, testified that he was a resident of the City of Topeka, Kansas, and a real estate dealer, and as such interested in business with witness, Shillinglaw; that just prior to the time of the execution of the contract as set up in the petition the defendant told him that he, the defendant, had for sale the lands described in the petition as situated in Pottawatomie County, Oklahoma, and was desirous of selling them at the price listed with witness, Shillinglaw, or of trading them for lands in Shawnee county, Kansas, and that the said lands were listed with witness, Shillinglaw, or of trading them for lands in Shawnee county, Kansas, and that the said lands were listed with witness, Shillinglaw, and this witness, as the property of the defendant, and remained so listed until the time of the execution of the contract as set up in the petition. Witness, Shillinglaw, and Moffit both testified that the entries in their books showing the said lands to be listed as the property of the defendant was shown to the defendant, and that he had full knowledge of what such entries contained. The original entries from the books of witness, Shillinglaw, and Moffit, and identified by them, were introduced in evidence over objection of defendant, and in substance they consisted of a description of the lands described in the petition and situated in Pottawatomie county, Oklahoma, in the same manner that it is described in the petition and gave the price desired as \$20.00 per acre, and the owner as Aaron Sage.

E. H. Hewins, over the same objection, also testified that at the time of the conversation mentioned on page 13, and repeatedly and several times while on the trip to Pottawatomie county, Oklahoma, and returning therefrom, the defendant stated to him that he owned and had for sale the lands described in the petition as situated in Pottawatomie county, Oklahoma, and that he had no other lands in the said county; that he was anxious to dispose of the said lands in Pottawatomie county, Oklahoma, because they were the only lands that he had there and he wanted to get his landed property together near home. The plaintiff also testified over the same objection that the same statements were made by the defendant in the conversations at which he was present.

Ninth. The Supreme Court of the State of Kansas committed manifest error in sustaining each and all of the rulings of the lower court as specifically shown by all of the foregoing assignments of error and in sustaining and affirming the judgment of the trial court and in rendering final judgment against said appellant, Aaron Sage.

For which errors, the appellant, Aaron Sage, prays that the said judgment of the Supreme Court of the State of Kansas, dated October 21, 1912, be reversed and judgment rendered in favor of the appellant, Aaron Sage, and for costs.

LEE MONROE,

W. S. ROARK,

CARR W. TAYLOR,

Attorneys for Aaron Sage, Appellant.

122 [Endorsed:] No. 17478. George Hampe, Appellee, v. Aaron Sage, Appellant. Assignment of Errors. Filed Dec. 3, 1912. D. A. Valentine, Clerk Supreme Court. Monroe, Roark & Taylor, Attorneys, Topeka, Kansas.

123 *Writ of Error.*

Filed Dec. 3, 1912. D. A. Valentine, Clerk Supreme Court.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between George Hampe, appellee, and Aaron Sage, Appellant, wherein was drawn in question the validity and application of a statute of the United States and the decision was against the validity and application of said statute of the United States pleaded and relied upon by the said Aaron Sage, appellant, as a defense in said action, by reason whereof a manifest error hath happened, to the great damage of the said Aaron Sage, appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3rd day of December, in the year of our Lord one thousand nine hundred and twelve.

[Seal of District Court U. S., District of Kansas.]

MORTON ALBAUGH,
*Clerk District Court United States,
District of Kansas.*

Allowed, Dec. 3rd, 1912.

W. A. JOHNSTON,
Chief Justice, Supreme Court of Kansas.

124 [Endorsed:] 17478. George Hampe, Appellee, v. Aaron Sage, Appellant. Writ of Error. Filed Dec. 3, 1912. D. A. Valentine, Clerk Supreme Court.

125 In the Supreme Court of the State of Kansas.

No. 17478.

GEORGE HAMPE, Appellee,
v.
AARON SAGE, Appellant.

Journal Entry.

Now on this 3rd day of December, 1912, the appellant in this Court and plaintiff in error in the United States Supreme Court, Aaron Sage, presented his petition for a writ of error in the above cause, together with an assignment of errors attached thereto, and after full consideration of the same said writ of error was by the Court allowed and a bond to operate as a supersedeas bond was thereupon fixed by the Court in the sum of Seven Thousand Dollars (\$7,000); thereafter said plaintiff in error, Aaron Sage, presented his bond to the Court in the sum of \$7,000, with Fred Sage and George Sage as sureties thereto, and each of said persons having duly qualified that he was worth the sum of \$7,000 over and above his liabilities and exemptions, and the Court, being satisfied that said bond was sufficient in all respects, thereupon approved the same and ordered that said bond act as a supersedeas and that the execution of the judgment against the plaintiff in error, Aaron Sage, be suspended during the pendency of said case on error in the Supreme Court of the United States.

Thereupon the Court allowed a writ of error in said cause, which said writ of error was thereafter issued by Morton Albaugh, Clerk of the United States District Court within and for the District of Kansas.

Thereafter a citation to the defendant in error, George Hampe, was allowed and duly issued, properly attested, and the service of

same, together with an entry of appearance, was made and duly acknowledged by J. B. Larimer and A. M. Harvey, the attorneys of record for the said defendant in error, George Hampe.

126

Citation.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to George Hampe, Appellee,
Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein Aaron Sage is appellant in error and you are appellee in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Kansas, this 2nd day of December, 1912.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

TOPEKA KANSAS, December 2, 1912.

I, the undersigned attorneys of record for George Hampe, appellee in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

J. B. LARIMER,
A. M. HARVEY,
Attorney- for George Hampe, Appellee.

127 [Endorsed:] No. 17478. George Hampe, Appellee, v. Aaron Sage, Appellant. Citation. Monroe & Roark, Attorneys, 534 Kansas Avenue, Topeka, Kansas.

128

In the Supreme Court of Kansas.

No. 17478.

GEORGE HAMPE, Appellee,

v.

AARON SAGE, Appellant.

Bond.

Know all men by these presents, That we, Aaron Sage, as principal and Fred Sage and George J. Sage as sureties, are held and firmly bound unto George Hampe, appellee, in the sum of Seven Thousand Dollars to be paid to the said George Hampe, appellee, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 2nd day of December, 1912.

Whereas the above named Aaron Sage, appellant in error, seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the state of Kansas.

Now, therefore, The condition of this obligation is such that if the above named Aaron Sage, appellant in error, shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if he shall fail to make good his plea then this obligation to be void, otherwise to remain in full force and effect.

AARON SAGE.
FRED SAGE
GEO. J. SAGE.

STATE OF KANSAS,
Shawnee County, ss:

Aaron Sage, principal, and Fred Sage as surety and George J. Sage as surety, being each duly sworn on oath, depose and say: We are each of lawful age and are citizens of the state of Kansas, and know the contents of the foregoing instrument and bond to which we have attached our names. We each for himself say we are worth the sum of Seven Thousand Dollars over and above all debts, liabilities and exemptions.

AARON SAGE.
FRED SAGE.
GEO. J. SAGE.

Subscribed and sworn to before me this 2nd day of December, 1912.

[SEAL.]

DAY MONROE,
Notary Public.

My Commission expires April 7, 1915.

This Bond approved and to operate as a supersedeas. Dated December 2nd, 1912.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

Endorsed: No. 17478. George Hampe, appellee v. Aaron Sage, appellant.—Bond. Filed Dec. 3rd, 1912. D. A. Valentine, Clerk Supreme Court.

129 SUPREME COURT,
State of Kansas, ss:

I, D. A. Valentine, clerk of the supreme court of the state of Kansas do hereby certify that there was lodged with me as such clerk on December 3rd, 1912, in the matter of George Hampe, appellee v. Aaron Sage, appellant:

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the appellee, George Hampe, and one to file in my office.

In testimony whereof, I have hereunto set my hand and Affixed the seal of said court at my office in Topeka, Kansas, this 17th day of December, A. D. 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

130 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

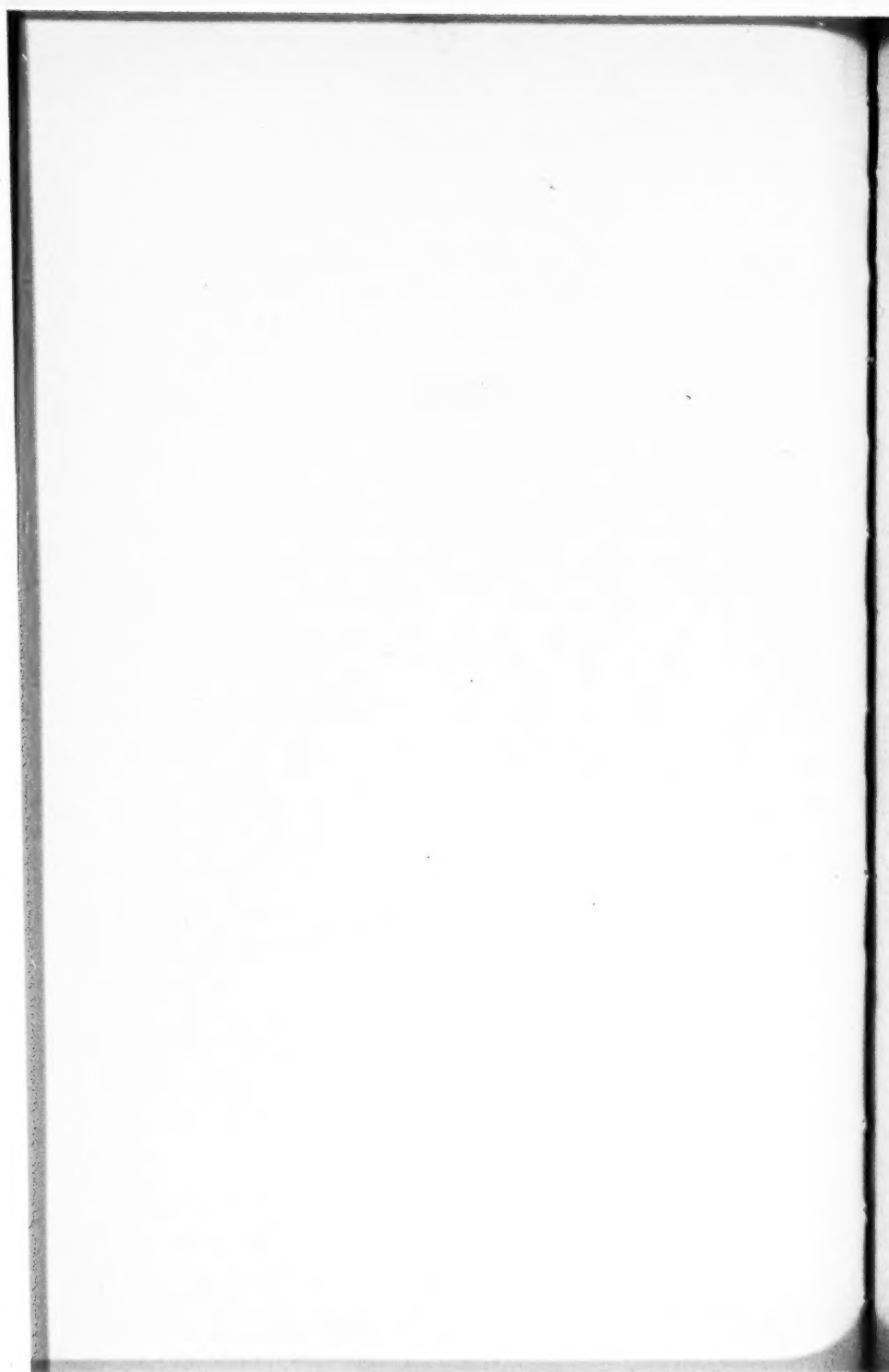
In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness, whereof, I hereunto subscribe my name, and affix the official seal of said Supreme Court of the state of Kansas, in the city of Topeka, this 17th day of December, A. D. 1912.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of Kansas.

Endorsed on cover: File No. 23,472. Kansas Supreme Court. Term No. 405. Aaron Sage, plaintiff in error, vs. George Hampe. Filed December 24th, 1912. File No. 23,472.



82
No. 82

(23,472)

Office Supreme Court.

FILED

OCT 7 1913

JAMES D. MAHER
CL

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

~~RECEIVED~~

AARON SAGE, PLAINTIFF IN ERROR,

VS.

GEORGE HAMPE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

**Statement, Brief and Argument by Plaintiff
in Error.**

EDWIN A. AUSTIN,

LEE MONROE,

W. S. ROARK,

CARR W. TAYLOR,

Attorneys for Plaintiff in Error.

(23,472)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 405.

AARON SAGE, PLAINTIFF IN ERROR,

VS.

GEORGE HAMPE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

**Statement, Brief and Argument by Plaintiff
in Error.**

Statement.

In September, 1891, allotments of an aggregate of 760 acres of land in Pottawatomie County, Oklahoma, were made under the General Indian Allotment Act of Feb. 8, 1887

(26 Stat. 1019) to six Indians of the Citizen Pottawatomie Tribe, to one of whom 120 acres were allotted, to each of two others, 80, and to each of the other three 160 acres. In January, 1892, a preliminary or trust patent, in the form hereinafter specified was issued to each allottee for his above mentioned allotment.

In August, 1907, plaintiff in error, who was a relative of each of the allottees, made a written contract to trade to Hampe, the defendant in error, "760 acres located in Pottawatomie County, Oklahoma" for "81½ acres located in Shawnee County, Kansas." No other description of either tract appears in the contract. (Transcript of Record, p. 8.) This action was originally brought in the District Court of Shawnee County, Kansas, by Hampe against Sage for the recovery of \$7652.50 damages for the non-performance of the above contract, alleging the lands referred to, but not described in the contract, were the 760 acres mentioned above. Sage answered Hampe's petition in the suit alleging among other things:

1. A general denial.

2. That the contract was void because the Oklahoma lands described in the petition had been allotted to Indians under the above mentioned Acts of Congress, which provided that any conveyance or contract made touching such lands before the expiration of 25 years from the date of the allotment and trust patents should be absolutely null

and void, that the 25 year period had not expired and the provisions of the Acts "had not been abrogated at the date of the alleged contract," as defendant in error "then well knew."

3. Fraudulent inducements to sign the contract and mutual mistakes and omissions therein.

4. That the contract was void under the provisions of the Statute of Frauds. (Transcript of Record, pp. 9-11.)

Upon the trial the plaintiff in error offered evidence to prove all of the allegations of his second defense. This evidence was rejected by the District Court, the right to submit the issue thereby raised, to the jury denied and instructions that it constituted a complete defense refused. The court also decided against his fourth defense. (Transcript, pp. 15, 16, 22, 23) and Hampe recovered a judgment against him for \$2647.66. The case was appealed to the Kansas Supreme Court and there affirmed by a divided court of 4 to 3.

By appropriate assignments of error (p. 26) all of the foregoing questions were raised in the Supreme Court. One of the chief questions raised and argued in that court was whether the provisions of the Federal Statutes above referred to made the contract absolutely void and precluded a recovery based upon such contract. The majority of the Supreme Court held that they did not. The syllabus, which the Kansas statute requires the court to file "at the time the decision is made," states as one of the points decided in the case that:

"The fact that the lands described in the memorandum were Indian lands held in trust for the allottees, who were members of the tribe of Pottawatomie Indians, and that under an act of congress and the terms of the trust patents issued for said lands, any conveyance or contract with reference thereto is declared to be absolutely null and void, will furnish no defense to an action for damages for breach of a contract by the defendant to sell and convey such lands." (P. 28.)

To this the Chief Justice and two of his associates dissented upon the ground that "the contract was void because so declared" by the Acts of Congress. The following language was used in the dissenting opinion:

"The contract was void because so declared by paramount law. The government owned the land and prescribed the conditions. It stipulated with the Indian to hold the title in trust for him for twenty-five years and declared that any previous contract to convey should be void. Damages can not be recovered for breach of a void contract. It is contrary to public policy to attempt to obtain that which the government as guardian for the Indian is holding for his benefit, and no court should directly or indirectly lend its aid to a connivance to that end." (P. 34.)

Sage brings the case here upon a writ of error insisting that it presents a clear cut Federal question conferring jurisdiction upon this court to review the decision of the highest state court as being a case wherein the losing party has always insisted "that a judgment could not be rendered against him consistently with the Statutes of the United States."

Another question arising herein is whether the lack of any description of either tract of land other than as above stated rendered the contract void under the Statute of

Frauds. The suit was twice tried in the lower court and twice heard in the State Supreme Court. Upon the first hearing in the latter court it was held that the contract itself, standing alone, was insufficient to meet the requirements of the statute. Upon a re-trial in the lower court Hampe was permitted to bolster up this insufficient description of the land by proving that he owned only one 81½ acre tract in Shawnee County, Kansas, and that Sage had stated to certain third persons that he neither had nor claimed an interest in any land in Oklahoma other than the 760 acres so allotted to his relatives. The manner in which the foregoing and other errors complained of occurred in the trial court and were presented to the State Supreme Court are more fully set forth in the following

Assignment of Errors

Which was duly filed in said State Supreme Court:

The Supreme Court of Kansas erred in holding and deciding that the contract upon which the defendant in error, George Hampe, based his cause of action and which provided for an exchange of Indian lands situated in Pottawatomie County, Oklahoma, was a valid and binding contract, notwithstanding the fact that under and by virtue of the provisions of the Act of Congress, approved February 8, 1887, entitled, "An Act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the Territories over the Indians and for

other purposes," and wherein it is provided that any conveyance or contract made, touching the said lands before the expiration of the period of twenty-five years mentioned in the patents issued and said Act of Congress, shall be absolutely null and void. Said Act of Congress was in full force and effect and the twenty-five years from the respective dates of the allotments and patents thereunder had not expired at the time said contract for the exchange of said Pottawatomie Indian lands was made or at the time this suit was instituted and it was the contention of said plaintiff in error that said Act rendered the said contract to exchange of said Indian lands for other property absolutely null and void, even if said contract contained a sufficient description of said lands (which plaintiff in error denied) upon which to base an action for damages under the Statute of Frauds.

The said errors are more particularly set forth as follows:

1. The defendant in error, George Hampe, commenced this action for damages against the plaintiff in error, Aaron Sage, upon the following contract:

"August 20th, 1907.

"This is to certify, that on the above date, this contract made between Aaron Sage, party of the first part, and Geo. Hampe, party of the second part. Party of the first part agrees to take twenty dollars per acre for (760) seven hundred and sixty acres located in Pottawatomie County, Oklahoma, which amounts to Fifteen Thousand Two Hundred (\$15,200.00) Dollars. Party of the first part further agrees to take back a mortgage of six thousand dollars at five per cent. per annum. Party of the second part agrees to take (\$160.00) One Hundred and Sixty Dollars per acre for 81½ acres located in Shawnee County, Kansas, which amounts

to Thirteen Thousand and Forty Dollars (\$13,040.00). Said party of second part further agrees to give said party of the first part a first mortgage of \$6,000.00) Six Thousand Dollars, with interest at five per cent. per annum on said land located in Pottawatomie County, Oklahoma, these figures are thus in full:

Party of the first part.....	\$15,200
Party of second part.....	13,040
	<hr/>
Balance due Aaron Sage.....	\$ 2,160
First mortgage on Hampe land.....	2,500
	<hr/>
	\$4,660
Interest on mortgage to January 1, 1908	112
	<hr/>
	\$4,772
Amount of mortgage.....	\$6,000
Amount of mortgage and interest and difference.	4,772
	<hr/>
To be cash from Sage to Hampe.....	\$1,228
Witness this 20th day of August, 1907.	
Aaron Sage.	
Geo. Hampe."	(P. 8.)

The defendant in error prayed for a judgment for his damages for the non-performance of the above contract on the part of plaintiff in error in the sum of \$7652.50 with interest and costs. The plaintiff in error denied all liability upon said contract, first, for the reason that said contract was not sufficeint under the statute of frauds, and, second, pleaded the following defense:

"Second. And for a second answer to said amended and supplemental petitoin as amended, said defendant further says—that the land described in said second amended and supplemental petition as amended, as situated in Pottawatomie county, Oklahoma, was at the time of the execution of said alleged contract, as said plaintiff then well knew, Indian land allotted and patented to members of the Tribe of Pot-

tawatomie Indians and not to this defendant under the provisions of the act of Congress approved February 8th, 1887, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territory over the Indians and for other purposes, copies of which patents are hereto attached marked Exhibit 'A,' 'B,' 'C,' 'D,' 'E,' and 'F,' and made a part hereof and in and by said act of Congress it is provided that ANY conveyance or *contract* made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents and said act of Congress, shall be absolutely null and void and defendant says that said period of twenty-five years from the date of said allotment and trust patent had not expired and had not been abrogated at the date of the alleged contract set out in a part of plaintiff's second amended and supplemental petition as amended." (P. 9.)

The plaintiff in error also pleaded a general denial and to this answer and attached copies of the six patents as mentioned in said second clause of his answer as Exhibits A, B, C, D, E and F, showing all of said lands to be situated in Pottawatomie county, Oklahoma, said descriptions being fully set forth in the record herein at page 115 (Transcript, p. 62). Each of said patents, omitting the testimonium clauses and signatures naming the different allottees and different tracts, reads as follows:

"The United States of America, To all whom these presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States, a schedule of allotment of land dated Sept. 15, 1891, from the Commissioner of Indian Affairs, approved by the Secretary of the Interior, Sept. 16th, 1891, whereby it appears that under the provisions of the Act of Congress approved February 8, 1887, (24 Stat. 388), as amended by the Act of Congress of March 3, 1891, (26 Stat. 1019), (here follows name of allottee), an Indian of the Citizen Pottawatomie tribe or band has been allotted

the following described land: (here follows description of land), Oklahoma Territory, containing (here follows area) acres. Now, Know Ye, That the United States of America, in consideration of the premises and in accordance with the provisions of the fifth section of said Act of Congress of February 8, 1887, *hereby declares* that it does and will hold the land thus allotted (subject to all the restrictions and conditions in said fifth section) for the period of twenty-five years in trust for the sole use and benefit of the said (here follows name of allottee), or in case of his decease, for the sole use of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may, in his discretion, extend the said period."

These patents were dated Jan. 19, 1892. Hampe's reply was an unverified general denial. (Pp. 11, 12.)

II. That there is manifest error in the proceedings of the trial court in that it refused to permit the plaintiff in error to testify in support of the second allegation of his answer above set forth, as follows:

"Q. Was all of this land allotted land? A. Yes, sir.

Q. Had any *fee simple* patents been received for this land, or any part of it, from the government?

Mr. Harvey: To which the plaintiff objects as calling for incompetent and immaterial testimony.

The Court: I think this raises the question that was thrashed out before and I think this court, in effect, held before that it was immaterial about the *fee simple* title of this land, and I see no reason to change my views on that point, and will sustain the objection. To which ruling of the court the defendant at the time duly excepted and still excepts. (P. 16.)

Q. Was any of this land deeded land?

Mr. Harvey: To which the plaintiff objects as calling for incompetent and irrelevant testimony.

The Court: The objection is sustained. (To which rul-

ing the defendant excepted.)

Q. Did you personally own any portion of this land?

Mr. Harvey: To which the plaintiff objects as calling for incompetent, irrelevant and immaterial testimony.

The Court: The objection is sustained. (To which ruling the defendant excepted.)

The Court: I think it is immaterial.

Mr. Austin: I desire to make an offer to prove in this connection. I offer to prove by this witness that at the time of the execution of this alleged contract set up in the petition all of the land described in the petition as situated in Pottawatomie county, Oklahoma, was Indian land, allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under the provisions of an Act of Congress approved February 8th, 1887, entitled: "An Act to Provide for the Allotment of Lands in Severalty to Indians of the Various Reservations and Extending the Protection of the Laws of the United States and the Territories over the Indians and for Other Purposes," which patents declares that the United States does and will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of said Indians, and that this twenty-five year period with respect to these particular lands had not yet expired or been determined or abrogated by the Government at the date of the contract set up as a part of plaintiff's second amended and supplemental petition as amended.

Mr. Harvey: To which the plaintiff objects for the reason that it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any issue in the case.

The Court: The objection is sustained. (To which ruling of the court the defendant at the time duly excepted and still excepts.)" (Pp. 15, 16.)

III. The trial court further committed manifest error in refusing to give to the jury the following special charges and instructions tendered by the plaintiff in error:

"4. The jury are instructed that if they find that the real estate described in the petition of the plaintiff as the land defendant is alleged to have agreed to sell plaintiff is Indian land, allotted and patented to members of the tribe

of Pottawatomie Indians, and not to this defendant, under an act of Congress, under patents, which provided that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, and that at the time of the execution of the agreement sued on in this action, the said twenty-five year period had not expired and had not been abrogated, and that the plaintiff knew at the time of the execution of said agreement that the real estate alleged to be referred to is the same as the land for which the defendant offered to take \$20.00 per acre was Indian lands allotted under Acts of Congress, he was chargeable with knowledge of the terms of said Acts and conditions under which the land was held, and can not charge the defendant with damages for his refusal to carry out the agreement sued on in this action. (P. 20.)

5. The jury are further instructed that the execution and delivery of the trust patents attached to the defendant's answer herein is admitted by the pleadings, and that the title to the real estate described therein continued by the legal effect of said instruments, to be held by the United States in trust for the period of twenty-five years from the date thereof, January 19, 1892, for the sole use and benefit of the allottee named therein, and that any conveyance or contract made by said allottee touching the said lands before the expiration or abrogation of said period of twenty-five years is absolutely null and void. The burden is, therefore, upon the plaintiff to establish that said trust period had been abrogated and that the defendant had become the owner of it legally or equitably at the time of the execution of the agreement sued on in this action, before he can recover in this action. (P. 20.)

6. The jury are further instructed that if the trust period of twenty-five years had not been terminated at the date of the agreement sued on in this action, the defendant was not the owner of the real estate described in the trust patents attached to the answer of defendant and the same cannot be regarded as the land referred to or intended to be referred to in said agreement. No oral representations or claims made by or control exercised by the defendant, over the lands described in these trust patents, can be considered for the purpose of identifying the land referred to or intended

to be referred to in the agreement sued on in this action. (P. 20.)

IV. The trial court further committed manifest error in refusing to submit to the jury upon the request of said Aaron Sage, the following special questions of fact: (P. 22.)

“Question No. 1. Was the Oklahoma land described in plaintiff’s petition at the date of the execution of the agreement sued on in this action, August 20th, 1907, Indian Land allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under patents which provided that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made and which period had not then expired or otherwise terminated?

Question No. 2. Had the United States made any patent or conveyance of the Oklahoma land described in the plaintiff’s petition at the date of the execution of the agreement sued on in this action, August 20th, 1907, other than the trust patents referred to in Question No. 1?

Question No. 3. Was the defendant, at the date of the execution of the agreement sued on in this action, August 20th, 1907, the owner of the Oklahoma land described in the plaintiff’s petition?

Question No. 4. Did the plaintiff know at the date of the execution of the agreements sued on in this action, August 20th, 1907, that the Oklahoma land described in the plaintiff’s petition was Indian land allotted and patented by trust patents to members of the tribe of Pottawatomie Indians and not to the defendant?

The trial court among other things instructed the jury as follows:

“Before you can find for the plaintiff in this cause you must find that the land described in his petition as situated in Pottawatomie county, Oklahoma, is in fact the land referred to in the written contract executed by plaintiff and defendant and attached to the petition in this cause, and

that at the time of the execution of said contract the defendant owned no other land and did not claim to own or have control of any other land in said Pottawatomie county, Oklahoma, and that the land described in the petition as situated in Shawnee County, Kansas, is in fact the same land as that referred to in said contract, and that the plaintiff at the time of the execution of said contract owned no other land within Shawnee County." (P. 24.)

Afterwards the jury returned a verdict against said Aaron Sage and in favor of said George Hampe, for \$2,647.66. (P. 25.) Afterwards the plaintiff in error filed his motion for judgment, notwithstanding the verdict of the jury, and also his motion for a new trial, which motions were both overruled by the court and judgment rendered in favor of the appellee for the amount of said verdict. (Pp. 25, 26.)

V. Upon the appeal the Supreme Court of Kansas erred in holding and deciding that the said contract, upon which this suit was based would sustain Hampe's action for damages, and that said Act of Congress, approved February 8th, 1887, (Chap. 119, 24 Stat. L. 389), providing that any conveyance or contract made touching the said lands before the expiration of the period of twenty-five years mentioned in said patents shall be absolutely null and void, did not constitute a defense to said action, and in affirming and sustaining the rulings and judgments of the lower court. The language of said court expressed in Section 3 of the syllabus so deciding being as follows:

"The fact that the lands described in the memorandum were Indian lands held in trust for the allottees, who were members of the tribe of Pottawatomie Indians, and that under an act of congress and the terms of the trust patents issued for said lands, any conveyance or contract with refer-

ence thereto is declared to be absolutely null and void, will furnish no defense to an action for damages for breach of a contract by the defendant to sell and convey such lands." (P. 28.)

The syllabus was by the court and is made the law of the case by Sec. 6188, General Statutes of Kansas 1909.

VI. The Supreme Court of the State of Kansas further erred in holding and deciding that the said contract for the exchange of said lands in Oklahoma for Kansas land was sufficient, under the Statute of Frauds, upon which to base an action for damages, notwithstanding that said contract does not describe said Oklahoma or Kansas lands.

VII. The trial court and also the Supreme Court of the State of Kansas further erred in holding and deciding that it was proper to allow the petition of the defendant in error to be amended so as to set out, describe and supply the description of certain lands in Pottawatomie County, Oklahoma, which were in fact allotted Indian lands not subject to contract, and lands in the State of Kansas, with the allegation that they were the lands intended to be exchanged by the parties in said contract, thereby adding to and supplementing said written contract of exchange.

VIII. That the Supreme Court of Kansas further committed manifest error in sustaining the lower court in its rulings admitting over the objections of the plaintiff in error certain incompetent, irrelevant and immaterial evidence for the purpose of sustaining said insufficient contract of exchange to wit:

George Hampe, the defendant in error, testified that he

was the owner of the land described in the petition as belonging to him and situated in Shawnee County, Kansas, and that he owned no other land in said county at the time of the execution of the contract as set up in the petition, and that at the time of making of the contract, as set up in the petition, said land was vested in him free and clear and unincumbered, except by a mortgage for \$2,500.00, and that this was the same land that was shown to and examined by the said Sage prior to the execution of the said contract; and that the title to the said land in Shawnee county remained in said Hampe as above stated until the time of the commencement of this action. (P. 22.)

He also examined as a witness in his favor Thomas G. Shillinglaw, who, over the objection of the plaintiff in error to each question and statement, that the same was incompetent, irrelevant and immaterial and an attempt to prove by parol a contract which is required by the Statute of Frauds to be in writing, which was overruled, testified that he was a resident of the City of Topeka, Kansas, engaged in the real estate business, making a specialty of the sale of farms and farm lands, and that a short time prior to the execution of the contract set up in the petition the plaintiff in error called at his place of business and listed the lands described in the petition as being situated in Pottawatomie County, Oklahoma, as being for sale, and then and at that time stated that he owned said lands and did not own any other land in said Pottawatomie County, Oklahoma, and that the reason he wanted to sell it was that it was all the land he did own in said county and that he intended to get rid of

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it and get some nearer home, and that said lands were listed for sale with the witness as the property of said Sage and to be sold at \$20.00 per acre, and that said lands were still listed with him as above stated at the time of the execution of the contract as set up in the petition. (P. 12.)

Also, George W. Moffitt, who, over the same objection, testified that he was a resident of the City of Topeka, Kansas, and a real estate dealer, and as such interested in business with witness, Shillinglaw; that just prior to the time of the execution of the contract as set up in the petition the plaintiff in error told him that he had for sale the lands described in the petition as situated in Pottawatomie County, Oklahoma, and was desirous of selling them at the price listed with witness, Shillinglaw, and this witness, as the property of the defendant, and remained so listed until the time of the execution of the contract as set up in the petition. Witness, Shillinglaw, and Moffitt both testified that the entries in their books showing the said lands to be listed as the property of said Sage was shown to him and that he had full knowledge of what such entries contained. The original entries from the books of witness, Shillinglaw, and Moffitt, and identified by them, were introduced in evidence over objection of plaintiff in error, and in substance they consisted of a description of the lands described in the petition and situated in Pottawatomie county, Oklahoma, in the same manner that it is described in the petition and gave the price desired as \$20.00 per acre, and the owner as Aaron Sage. (P. 12.)

E. H. Hewins, over the same objection, also testified that at the time of the conversation mentioned on page 13 of the

transcript and several times while on the trip to Pottawatomie County, Oklahoma, and returning therefrom, the plaintiff in error stated to him that he owned and had for sale the lands described in the petition as situated in Pottawatomie county, Oklahoma, and that he had no other lands in the said county, that he was anxious to dispose of said lands because they were the only lands that he had there and he wanted to get his landed property together near home. The defendant in error also testified over the same objection that the same statements were made by the plaintiff in error in the conversations at which he was present. (P. 13.)

IX. The Supreme Court of the State of Kansas committed manifest error in sustaining each and all of the rulings of the lower court as specifically shown by all of the foregoing assignments of error and in sustaining and affirming the judgment of the trial court and in rendering final judgment against said Aaron Sage.

Points and Authorities.

I.

A losing party to a suit who insists that the judgment therein cannot be rendered against him consistently with a given statute of the United States should be held, within the meaning of Sec. 709 R. S., now Sec. 237 of the Judicial Code, to claim such a right and immunity under such statute, as to confer jurisdiction upon this court to review an ad-

verse final judgment of the highest state court in such suit.

Nutt v. Knut, 200 U. S. 12, 19.

Ill. Central Rld. Co. v. McKendree, 203 U. S. 514, 525.

Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 532.

Straus v. Am. Publishers Ass'n., 231 U. S. 222, 233.

Anderson v. Carkins, 135 U. S. 483, 486.

Logan Co. Nat. Bank v. Townsend, 139 U. S. 67, 73.

McNulta v. Lockridge, 141 U. S. 327, 331.

McCormick v. Market Bank, 165 U. S. 538, 546.

Hammond v. Whittredge, 204 U. S. 538, 547.

St. Louis & Iron Mountain Ry. Co. v. Taylor, 210 U. S. 281, 293.

Kansas City So. Ry. v. Albers Com. Co., 223 U. S. 573, 591.

St. Louis & Iron Mountain Ry. Co. v. McWhirter, 229 U. S. 265.

Monson v. Simonson, 231 U. S. 341, 345.

II.

A contract to convey Indian lands prior to the removal of the statutory restrictions upon their alienation is void and no recovery can be had thereon by either party.

Hampe v. Sage, 87 Kan. 536, 546 (Dissenting Opinion).

Goat v. United States, 224 U. S. 458, 470.

23 Cyc. 341.

Lamb v. James, 87 Tex. 485, 29 S. W. 647.

Franklin v. Lynch, 233 U. S. 269, 273.

Starr v. Long Jim, 227 U. S. 613, 625.

Bledsoe v. Wortman., 35 Okl. 261, 129 Pac. 841.

Bowling v. United States, 233 U. S. —, 34 S. Ct. 659.

Clark on Contracts, 2 Ed., p. 134.

Bishop on Contracts, Sec. 471.

Larson v. First Nat. Bank, 62 Neb. 303, 87 N. W. 18.

Williams v. Steinmetz, 16 Okla. 104, 82 Pac. 986.

Kelly v. Harper, 7 Ind. Ter. 541, 104 S. W. 829.

Sayer v. Brown, 7 Ind. Ter. 675, 104 S. W. 877.

Dupas v. Wassell, 1 Dill. 213, Fed. Cas. No. 4182.

Mayes v. Live Stock Assn., 58 Kan. 712.

Light v. Conover, 10 Okl. 732, 63 Pac. 966.

Muskogee Land Co. v. Mullins, 165 Fed. 179, 91 C. C. A. 213.

Beck v. Flournoy Co., 65 Fed. 30, 12 C. C. A. 497.

III.

The restrictions upon the alienation of the Indian Lands involved herein had not been removed at the date of the contract for the sale thereof.

Monson v. Simonson, 231 U. S. 341, 346.

Trist v. Child, 88 U. S. 448, 452.

Meguire v. Corwine, 101 U. S. 108, 111.

McNutt v. Hoffman, 174 U. S. 639, 654.

IV.

The description of the lands in question contained in the contract sued on was insufficient to relieve it from the operation of the statute of frauds, and the reception of parol evidence to supply such description denied the effect of the Indian Allotment Act.

Williams v. Morris, 95 U. S. 444.

Bayne v. Wiggins, 139 U. S. 210.

Hampe v. Sage, 82 Kan. 728, 733.

Halsell v. Renfro, 14 Okl. 674, 78 Pac. 118.

Price v. Hays, 144 Ky. 535, 139 S. W. 810.

Schreck v. Moyse, 94 Miss. 259, 48 So. 513.

Benjamin on Sales, 6th Am. Ed., p. 209 Note.
20 Cyc. 278.

Johnson v. Buck, 35 N. J. L. 338.

Walker v. Fleming, 37 Kan. 171.

Argument.

I.

Counsel for defendant in error have filed a motion to dismiss upon the ground that no federal question is involved herein. We confidently expect this motion to be denied but presume counsel will still argue in their brief that this court is without jurisdiction. The nature of the case, as we have already pointed out, is that Hampe sued Sage for damages for failing to comply with a contract to convey certain Oklahoma lands. Sage, in defense, claimed immunity from liability under the contract upon the ground that the provisions of the General Indian Allotment Act of Feb. 8, 1887, and subsequent Acts of Congress amendatory thereto made the contract void. As pointed out in the second, third, fourth and fifth assignments of error the District Court refused to permit him to submit any evidence in support of this defense or to submit the question to the jury in any way and the Supreme Court affirmed its rulings

and judgment. This question has been so often and so recently decided by this court that it seems almost unnecessary to notice it. In *Nutt v. Knutt*, 200 U. S. 12, 19, the following rule was announced:

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Section 709, to assert a right and immunity under such statutes."

The language so used was subsequently approved and reaffirmed in:

Ill. Central Rld. Co. v. McKendree, 203 U. S. 514, 525.

Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 532.

In *Straus v. Am. Publishers Ass'n.*, 231 U. S. 222, 233, this court said:

"One who sets up a Federal Statute as giving immunity from a judgment against him, which claim is denied by the decision of a state court, may bring the case here for review under Sec. 709 of the Revised Statutes, now Sec. 237 of the judicial code."

The question involved in *Monson v. Simonson*, 231 U. S. 342, 345, was whether a deed to certain allotted Indian lands was void because of the restrictions in the general allotment act. The court said:

"The Federal question presented for decision by us is, whether the restrictions upon alienation imposed upon the allottee by Sec. 5 of the act of 1887 were instantly removed by the act of March 3, 1905, or remained in force until the issuing of the patent carrying the full and unrestricted title. The defendant sought to maintain the latter view, but the state court sustained the other."

Opposing counsel in their argument upon their motion to

dismiss suggest that "the judgment of the Kansas Court was based upon grounds independent of that statute" hence, they say, "no claim of . . . immunity under the . . . laws of the United States was decided against the plaintiff in error." This statement is illogical. Sage *claimed* immunity from liability upon the contract under the Act of Feb. 8, 1887. The judgment against him could be upheld only by deciding against such claim of immunity which brings the case at bar squarely within the rule of *Nutt v. Knutt, supra*.

In *Anderson v. Carkins*, 135 U. S. 483, 486, the defendants, being sued upon a contract to convey government land made prior to final entry, under the homestead laws, defended upon the ground that the contract was void under the Federal Statute. This court held that such a defense brought the case within the scope of Sec. 709 saying:

"Notwithstanding this defense so expressly stated a decree for specific performance was entered against them. Obviously, this could not be so entered without adjudging such defense insufficient, and denying to them the protection claimed under the homestead laws. . . . Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the homestead laws, and as the supreme court of Nebraska expressly declared that this invalidity under the homestead laws was not sustainable, it follows that the case is one in which a right was specifically set up and claimed under the statutes of the United States, and the decision and judgment of the state court were against that right. Hence the jurisdiction of this court cannot be doubted."

In *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67, 72, a National Bank was sued for debt upon a contract. It de-

fended upon the ground that the contract was void under the National Banking Act. In holding that it had jurisdiction to review the judgment therein against the bank this court said:

"The exemption or immunity thus specially set up in the court of original jurisdiction, and reasserted in the court of appeals of Kentucky, having been denied by the judgment, the authority of this court to re-examine that judgment, so far as it determines that no such exemption or immunity as that claimed by the bank, under the act of Congress, exists, is entirely clear."

The other decisions of this court hereinbefore cited are so clearly in line with our position upon this question that we do not care to further argue it.

II.

There can be no dispute about the facts relevant to the principal question involved herein. Sage, when sued on the contract to convey Oklahoma lands, alleged in the 2nd paragraph of his answer that the contract was void because the General Indian Allotment Act of 1887 so provided and that Hampe knew the facts when the contract was made. The language of the Act is clear, viz:

"And if conveyance shall be made of the lands set apart and allotted as herein provided or any contract made touching the same before the expiration of the time mentioned such conveyance or contract shall be absolutely null and void." (24 Stat. 389.)

He also alleged that none of the restrictions of the law, so far as they affected the Oklahoma land, had ever been removed (p. 17). He offered to prove these allegations,

asked the court to instruct the jury and to submit special questions thereon, which offer of proof and requests for the submission of special questions and instructions were, in the manner specified in our foregoing second, third and fourth assignments of error, refused by the lower court. After the court had sustained several objections to evidence of this character, Sage's counsel made the following offer of proof:

"I offer to prove by this witness that at the time of the execution of this alleged contract set up in the petition all of the land described in the petition as situated in Pottawatomie county, Oklahoma, was Indian land; allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under the provisions of an Act of Congress approved February 8th, 1887, entitled: 'An Act to Provide for the Allotment of Lands in Severalty to Indians of the Various Reservations and Extending the Protection of the Laws of the United States and the Territories over the Indians and for Other Purposes,' which the patents declares that the United States does and will hold the land thus allotted for a period of twenty-five years in trust for the sole use and benefit of said Indians, and that this twenty-five year period with respect to these particular lands had not yet expired or been determined or abrogated by the Government at the date of the contract set up as a part of plaintiff's second amended and supplemental petition as amended." (P. 16.)

This was objected to upon the ground that "it is incompetent, irrelevant and immaterial and does not tend to prove or disprove any issue in the case." Sustained and excepted to. (P. 16.) The court was asked to instruct the jury as follows:

"4. The jury are instructed that if they find that the real estate described in the petition of the plaintiff as the land defendant is alleged to have agreed to sell plaintiff is In-

dian land, allotted and patented to members of the tribe of Pottawatomie Indians, and not to this defendant, under an Act of Congress, under patents, which provided that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, and that at the time of the execution of the agreement sued on in this action, the said twenty-five year period had not expired and had not been abrogated, and that the plaintiff knew at the time of the execution of said agreement that the real estate alleged to be referred to is the same as the land for which the defendant offered to take \$20.00 per acre was Indian lands allotted under Acts of Congress, he was chargeable with knowledge of the terms of said Acts and conditions under which the land was held, and can not charge the defendant with damages for his refusal to carry out the agreement sued on in this action." Refused and excepted to. (P. 20.)

The question of the binding effect of contracts to sell Indian lands within the restricted period or other public lands whose sale is prohibited has often been before the courts, and such contracts, whether made by the Indian or by others, have almost universally been held void. The reason for such a rule is well stated in the dissenting opinion herein as follows:

"The contract was void because so declared by paramount law. The government owned the land and prescribed the conditions. It stipulated with the Indian to hold the title in trust for him for twenty-five years and declared that any previous contract to convey should be void. Damages can not be recovered for breach of a void contract. It is contrary to public policy to attempt to obtain that which the government as guardian for the Indian is holding for his benefit and no court should directly or indirectly lend its aid to a connivance to that end." (P. 34.)

The reason why such lands cannot become the subject of a legal contract of sale is because the law forbids it. In

Goat v. United States, 224 U. S. 458, 470, this court said:

"The inalienability of the allotted lands was not due to the quality of the interest of the allottee, but to the express restriction imposed."

The law never enforces contracts to sell property which is not a legal subject of barter and sale. This question frequently arises in suits to recover upon agreements to pay for intoxicating liquors sold in localities where such sales are forbidden by law. It is held that no recovery can be had upon such contracts.

23 Cyc. 341.

It was accordingly held in *Lamb v. James*, 87 Tex. 485, 29 S. W. 647, that a contract to sell public lands, the title to which could be acquired only by settlement and residence, was void. The court said:

"The public lands are not a lawful subject of a private contract, and an attempted conveyance thereof by one private person to another passes no interest whatever in the land, and does not create the relation of vendor and vendee, and, therefore, cannot be held to furnish a consideration for the payment, the promise of payment, or the recovering of the supposed consideration of such conveyance."

This Court, in *Franklin v. Lynch*, 233 U. S. 269, 273, in construing the effect of a section of the Oklahoma statute, which provides that if a grantor conveys real estate without title, but afterwards acquires the same, the subsequently acquired real estate shall pass to the grantee, upon a conveyance made by an allottee before removal of restrictions, said:

"It has no effect here because it is inconsistent with the Act of 1902 which declared that Indian land should not be affected by a deed before patent. The deed to Franklin having been made before allotment was void."

In the same opinion it was also said:

"All who dealt with her, as to land thereafter allotted to her, were charged with knowledge that the Act of 1902 declared that such land should not be affected by any contract made before allotment. The deed of 1905 was therefore a nullity and did not estop her from showing that it had been made in direct violation of the statute."

The decisions of the state courts herein appear to be based upon the idea that one contracting to convey land and representing that he owns and has the right to convey it is estopped to assert the contrary when sued for non-performance of his agreement. In this they overlooked the fact that no estoppel can be based upon a contract to convey property which the law says is not a legitimate subject of barter and sale. This court in *Starr v. Long Jim*, 227 U. S. 613, 625, in holding that a warranty deed for a tract of allotted land, made by an Indian allottee prior to the removal of restrictions, did not convey an after acquired title, said:

"It follows as matter of course that a conveyance made by one of them, before the title was vested in him pursuant to the act of 1905, was in the very teeth of the policy of the law, and could not operate as a conveyance, either by its primary force or by way of estoppel."

The Oklahoma Supreme Court, in passing upon the effect of the State Statute referred to in *Franklin v. Lynch, supra*, and the force of a deed to Indian land as an estoppel when made prior to the removal of restrictions, said in its opinion

in *Bledsoe v. Wortman*, 35 Okl. 261, 129 Pac. 841:

"The rule of estoppel as declared by said section 642 has no application to conveyances executed in the face of the law. Such conveyance being void when executed, said section 642 was not intended to breathe life into it."

Again, the restriction was not a personal one, but one running with the land. This was well and clearly stated in *Bowling v. United States*, 233 U. S.,—34 S Ct 659, as follows:

"The question, then, is whether the restriction imposed by the act of 1889 was a merely personal one, operative only upon the allottee, or ran with the land, binding his heirs as well. This must be answered by ascertaining the intent of Congress as expressed in the statute. The restriction was not limited to 'the lifetime of the allottee,' as in *Mullen v. United States*, 224 U. S. 448, nor was the prohibition directed against conveyances made by the allottee personally. Congress explicitly provided that 'the land so allotted' should not be subject to alienation for twenty-five years from the date of patent. 'Said lands so allotted and patented' were to be exempt 'from levy, sale, taxation, or forfeiture for a like period of years.' The patent was expressly to set forth that 'the land therein described and conveyed' should not be alienated during this period, and all contracts 'to sell or convey such land' which should be entered into 'before the expiration of said term of years' were to be absolutely void. These reiterated statements of the restriction clearly define its scope and effect. It bound the land for the time stated, whether in the hands of the allottee or of his heirs."

It was, therefore, impossible, because of the inhibition of the statute, for Sage to convey the land by good title and it is a well established principle that no liability can be created by a contract to do an impossibility. This is stated in *Clark on Contracts*, 2 Ed. p. 134, as follows:

"A promise to do something which is either impossible in law, or physically impossible, is no consideration. . . . The consideration may be either (1) impossible in law, or (2)

physically impossible."

So, too, it is said in Bishop on Contracts, Sec 471:

"Any act which is forbidden either by the common or the statutory law—whether it is *malum in se*, or merely *malum prohibitum* . . . cannot be the foundation of a valid contract; nor can anything auxiliary to, or promotive of, such act."

Coming now to authorities more directly in point upon the question of whether forbidden contracts of this nature to which neither the allottee or his heirs is a party are void, we find that in *Larson v. First Nat. Bank*, 62 Neb. 303, 87 N. W. 18, a live stock company contracted to lease Indian land to Larson, who gave his note therefor. Neither party to the contract was an allottee. The bank was an innocent purchaser of the note. The court held the whole transaction void and that no contract of any sort relating to a conveyance of such lands could be made the basis of a legal agreement. It said:

"The rule that a tenant cannot dispute the title of his landlord is urged as an estoppel against the plaintiff in error, and it is insisted that, having taken a lease from the Fournoy Company, he ought not to be allowed to show the invalidity of the title of that company as a defense to the note. . . . If, as Congress has declared, this lease was absolutely null and void, we cannot comprehend how any right of any kind can be founded on it or grow out of it. How can one claim another as his tenant under an agreement which the law declares shall have no existence, and under which no right or duties of any character can be claimed? . . . To allow any right to be founded on a lease of the character of the one in question would be offering a premium to those reckless enough to assume the attitude of landlord over the lands with which the government has forbidden them to deal."

The plaintiff, Steinmetz, in *Williams v. Steinmetz*, 16 Okl. 104, 82 Pac. 986, leased a tract of land which had been allotted under the Act of February 8, 1887, from the allottee, took possession thereof, fenced it and planted it to corn. Afterwards a herd of cattle, part of which belonged to the allottee and part to another person, broke through the fence and destroyed the corn. Steinmetz sued both the allottee and the other owner of the cattle for the value of the corn but the court held he could recover from neither of them. It said:

"The making of the lease in question was plainly a violation of this statute. It was '*a contract made touching the land*' and '*conveying the same,*' within the spirit of the law, and, was, therefore, null and void. . . . The lease in question was made in violation of a positive statute of the United States, and, therefore, the courts will not aid the parties in enforcing it. Nor will they grant relief when its terms have been violated. The lessees had no right on the allotted land of Robert L. Williams, and they planted and cultivated the crops at their own peril. For their destruction, they cannot recover damages. . . . The corn had not been harvested, and a suit for damages for its destruction necessarily involves the legality of the lease."

In *Kelly v. Harper*, 7 Ind. Ter. 541, 104 S. W. 829, a question quite like the one in the case at bar was involved. Harper, a white man, contracted to sell Kelly, another white man, a tract of Indian land, the payment to be made when Harper could "secure possession and same is allotted." The court held the contract absolutely null and void, saying:

"There is no provision for any such sale as called for by the contract in this case, and, therefore, the contract sued on was void. Until the land was allotted, and the period of restrictions upon alienation of one, three, and five years had expired, a person who is not a citizen of an Indian tribe has no authority to purchase or sell Indian lands. . . . Inas-

much as the contract sued on was void, the complaint did not state a cause of action, and the demurrer should have been sustained."

In *Sayer v. Brown*, 7 Ind. Ter. 675, 104 S. W. 877, Sayer, a white man, made an agreement with Brown, an Indian, to secure title to Indian lands which he, Brown, could hold, under an agreement that when the restrictive period expired Brown should deed him a half interest therein and advanced \$600 on the contract. The court held the agreement unenforceable, saying:

"If the sale of this land were a lawful one, and the contract between the parties not in violation of law, there is no question but that a court of equity would enforce it. But it was forbidden by the statute, and was against the policy of the Government, and, therefore, void. . . . 'No principle of law is better settled than that a party to an illegal contract can not come into a court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the ground-work of his claim.' . . . (9 Cyc. 546.) The rule is so well established and known as to have become elementary. But there are some exceptions to the rule, generally grouped by the text-writers into five heads: (1) When public policy requires the intervention of laws (here public policy requires no such intervention). . . . And (5) where the party complaining can exhibit his case without relying upon the illegal transaction. Here the very foundation of the suit is the illegal contract."

It will be noted that Hampe, like Sayer, *can not exhibit his case without relying upon the illegal contract.*

In *Dupas v. Wassell*, 1 Dill, 213, Fed. Cas. No. 4182, Judge Caldwell held that a squatter on the Hot Springs Reservation which the Federal statute provided "shall be reserved for the future disposal of the United States and shall not

be entered, located or appropriated for any other purpose whatever" could not recover upon a lease of the portion of the Reservation which he had unlawfully settled upon, saying:

"Every agreement that parties may make does not, in law, amount to a contract having a binding obligation. Contracts to do an illegal act, and contracts against good morals and public policy are void; and the law will not lend its aid to either party to such a contract to compel its performance or enforce any right claimed under it. Leases are not exempt from the operation of this rule. . . . The Reservation was not *public lands* in the ordinary and common acceptation of these words. These lands could not be entered, located or appropriated for any purpose whatever. This was the law when the plaintiff 'squatted' on them. He was a trespasser and might have been criminally punished for his trespass. He had no right and could acquire no right to treat this Government property as his own; and in attempting to do so, he was acting in violation of law; and any lease he may have granted to any portion of the Reservation was utterly void."

The doctrine so laid down by Judge Caldwell was recognized, and the Dupas case cited as authority in *Mayes v. Live Stock Assn.*, 58 Kan. 712, wherein it was held that no action could be maintained upon a lease of Indian lands prohibited by law. It is true that under ordinary circumstances a person contracting to sell land of which he is not the owner becomes liable for damages for breach of such contract, but why? One reason is that under the circumstances he is ordinarily estopped from denying ownership. It is, as this court held in *Starr v. Long Jim*, *supra*, a thoroughly well established principle, however, that estoppel cannot be based upon an illegal contract. Applying this principle it was held in *Light v. Conover*, 10 Okl. 732, 63

Pac. 966, that a tenant under a void lease on Indian land could not be held liable for rent. The court said:

"But it is contended by the defendant in error that the defendants were tenants of the plaintiff, and used and occupied the land, and, therefore, are estopped from denying the plaintiff's title, or to question the legality of the lease. We think not. The written lease, as well as the parol agreement, were not only contrary to public policy, but were entered into in violation of a positive statute, and hence the doctrine of estoppel does not apply."

In *Muskogee Land Co. v. Mullins*, 165 Fed. 179, 91 C. C. A. 213, the Land Company held the premises under a lease from the allottees who had a right to lease the land for agricultural but not for grazing purposes. Mullins leased from the Company and when the lessor sued for rent claimed that the original lease from the Indians was void because it was, in fact, made with the intention to graze and not to farm the land. The court held that Mullins might, by parol proof, dispute the terms of his own lease to show its real purposes and that he was not estopped to dispute the title of his landlord, using this language:

"The land company held the premises under some kind of right derived from allottees of the Creek Nation . . . It made a lease to Mullins, on its face purporting to be for agricultural purposes. . . . On this controlling issue of fact the writing is not conclusive. Parol evidence is always competent to show that a written contract, fair and lawful on its face, is in truth, contrary to law, morals, or public policy. . . . If the lease now in controversy between the land company and Mullins was not authorized by the owners of the land the Creek citizens, in their contract with the land company, it was unwarranted, and constituted a violation of the spirit of the Act of Congress in question. If it was authorized by them it constituted a violation of the letter of the law and is void. . . . The general rule invoked by the

land company prohibiting a tenant from denying the title of his landlord has no application to this case. . . . Nothing can be plainer than that an intentional violator of the law cannot invoke the equitable principle of estoppel for the purpose of protecting him in such violation. Defendant, therefore, is not estopped from denying the validity of his landlord's title, or from asserting the invalidity of his contract as actually made with the land company."

A number of other decisions bearing upon this question are cited and quoted from in the dissenting opinion herein appearing at pages 34 to 36 of the transcript, to which the attention of this court is directed. Upon the general policy of the courts to make the restrictions of the Act of February 8, 1887, thoroughly effective, Judge Sanborn remarked in *Beck v. Flournoy Company*, 65 Fed. 30, 12 C. C. A. 497:

"The motive that actuated the law makers in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain as to leave no room for doubt that Congress intended to *put it beyond the power of white men* to secure any interest whatsoever in the lands situated within Indian reservations that might be allotted to Indians."

III.

The allotment certificates or trust patents for the Oklahoma lands recited that they were issued under the General Allotment Act of "Feb. 8, 1887 (24 Stat. 388) as amended by the Act of Congress of March 3, 1891 (26 Stat. 1019)" (p. 20). We have endeavored to show that the effect of these statutes was to render void any contract to sell such lands by any one until the restrictions therein were removed. At page 5 of their brief in support of their motion to dismiss in this court, opposing counsel say:

“The Statutes of 1894 (28 Stat. 295) and 1900 (31 Stat. 247) referred to in the opinion provided that Indian lands of the character referred to may be sold before the end of the twenty-five year period.”

This statement is misleading. Neither of Acts referred to purports to entirely remove the restrictions of the Act of 1887. The Act of 1894 provides that under certain circumstances a Citizen Pottawatomie Indian may sell his allotted land in excess of eighty acres and under other circumstances may sell his entire allotment, but that such conveyance must in either event, “be subject to the approval of the Secretary of the Interior under such rules and regulations as he may prescribe.” The latter Act merely extended the provisions of the former to the heirs of deceased allottees. Neither Act attempted to remove the restrictions except in such cases as the Secretary of Interior might approve and then only upon a compliance with the rules and regulations of the Department of the Interior. It will not be claimed that the record discloses any affirmative action approving the sale of a single acre of the land in question by the Secretary. In fact, counsel for the plaintiff in error, out of an abundance of caution, offered, upon the trial, to do the wholly unnecessary thing of proving a negative, by offering to prove, as specified in our second assignment of error, that no fee simple patents had issued for any of the lands in question (p. 15) and “that this twenty-five year period with respect to these particular lands had not yet expired or been determined or abrogated by the Government at the date of the contract,” but upon the objection of counsel for the defendant in error, which

evidence was rejected. (p. 16.) In other words Hampe did not undertake to prove that the Secretary had ever approved a sale of the lands or that the restrictions had been removed and at the instance of his counsel the trial court refused to permit Sage to prove the contrary. This rejected evidence was clearly responsive to the allegation of the second paragraph of Sage's Answer. (P. 9.) This court, in the recent case of *Monson v. Simonson*, 231 U. S. 341, 346, held that a conveyance of allotted Indian land, even though made after the Secretary of the Interior had been authorized by law to issue a fee simple patent but before he had actually done so, was void, saying:

"Congress by the provision in the Act of March 3, 1905, clothed the Secretary with such authority with respect to this allotment. That provision says: 'The Secretary of the Interior is hereby authorized and empowered to issue a patent' to the allottee. . . . The language of the provision is permissive, not mandatory, and evidently was designed to enable the Secretary to shorten the trust period, by issuing the final patent, if in his judgment it seemed wise, but not to require him to do so. . . . We conclude that the restrictions upon alienation contained in the Act of 1887 were not instantly removed by the Act of 1905, but remained in force as to this allotment until the Secretary of the Interior, in the exercise of the authority conferred by the latter Act, terminated the trust period by issuing the final patent passing the fee."

The majority opinion herein by the State Supreme Court was not based upon a claim that the restrictions were removed by these subsequent Acts of Congress. Upon this question the court said:

"We do not rest our decision, however, upon the effect of the Acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for

damages for the breach of his contract to sell and convey the lands in question although he may have had no present interest therein and no means of compelling a conveyance at the time he entered into the contract." (P. 33.)

Counsel very adroitly seek to avoid meeting the question now under discussion by saying at page 5 of their brief upon their motion to dismiss:

"And the testimony at the trial, a part of which is shown on page 15 of the transcript of record, shows that the very land in question here were in fact sold shortly after the trade was made with Hampe and long before the twenty-five year period had expired. Notwithstanding the showing that the land in question was subject to sale the Supreme Court of Kansas preferred to rest its decision, etc."

Now this testimony which they say shows such sale was irresponsive to any question asked was stricken out by the court *at the instance of Mr. Hampe's attorneys*. It was as follows:

"Q. What was the market value of the land at that time?

A. It was twelve or thirteen dollars an acre, *for that it what it was sold for.*"

The italicised words were stricken out by the court upon the motion of the counsel who now make the above statement. (Transcript p. 15, Record p. 27.) Not only that but the testimony referred to neither shows when such sale was made nor whether it embraced all of the Oklahoma land.

Again the restrictions may have been removed by the Secretary of the Interior pursuant to the terms of the Act of May 8, 1906 (34 Stat. 182) long after the date of the contract and but shortly prior to the trial which

occurred on Dec. 2, 1910. (P. 2.)

This last mentioned Act provides that the Secretary of the Interior

“May in his discretion, and he is hereby authorized whenever he is satisfied that any Indian Allottee is competent and capable of managing his or her affairs at any time, cause to be issued to such allottee a patent in fee simple and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed.”

If the restrictions were thus removed *after* Aug. 20, 1907, the date of the contract sued on, then the contract was clearly void under the ruling in *Monson v. Simonson, supra*.

Let it be borne in mind that Sage alleged in his answer, that none of the restrictions had been removed at the date of the contract (p. 9), that in the manner pointed out in the second assignment of error he offered to prove not only that no fee simple patents had issued for any of the land (p. 15) but also that the restricted period “had not yet expired or been determined or abrogated by the Government when the contract was made” (p. 16) and that all of his said offers of proof were rejected by the court upon the objections of opposing counsel. What he now asks at the hands of this Court is a determination of whether such facts, if established, constitutes a defense to this action, and if it be so held, a reversal of this case, that he may be afforded an opportunity to make such proof.

It would not strengthen Mr. Hampe's position even if it were shown that the restrictions had been removed from a portion of the land prior to the date of the contract, because

the contract is an inseparable one, and if it is void as to a portion of the land it must fail entirely. In *Trist v. Child*, 88 U. S. 448, 452, it was held that a contract in part for legal services and in part for those forbidden by law was wholly void. The court said:

"We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together."

To the same effect see

Meguire v. Corwine, 101 U. S. 108, 111.

McNutt v. Hoffman, 174 U. S. 639, 654.

IV.

The Kansas statute of frauds is simply declaratory of the common law. It reads as follows:

"No action shall be brought whereby to charge . . . any person upon any . . . contract for the sale of lands, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing." (Gen. Stats. 1909, Sec. 3838.)

The only description of either tract of land referred to in the contract was "seven hundred and sixty acres located in Pottawatomie County, Oklahoma," and "81½ acres located in Shawnee County, Kansas." (P. 8.) Upon the first trial Hampe recovered a judgment which was reversed by the Supreme Court upon the ground that the contract did not

contain a sufficient description of the land to meet the requirements of the statute. (*Hampe v. Sage*, 82 Kan. 728.) Defendant in error then, by an amended petition, sought to avoid the effect of the statute by alleging that he owned a certain described 81½ acre tract of land in Shawnee County, Kansas, "which said land was shown to defendant and examined by him shortly prior to August 20, 1907," that "a short time prior to the execution of said contract" Sage showed him certain described lands in Pottawatomie County, Oklahoma, containing an aggregate area of 760 acres and that "said tract of land was the only land in Pottawatomie County, Oklahoma, which said defendant then owned or claimed to own or have dominion over or control of or in which he had or claimed to have any interest." (Pp 6, 7.) The 4th paragraph of Sage's answer alleged the contract was void because the description of the lands therein contained was insufficient to meet the requirements of the statute. (P. 10.) In the manner specified in our 6th, 7th, 8th and 9th assignments of error this question was raised upon the trial and in the Supreme Court and in each instance decided adversely to Mr. Sage.

In *Williams v. Morris*, 95 U. S. 444, it was claimed that a parol contract, partly performed, supplemented by written receipts was insufficient to take the case out of the protection of the statute. One of the receipts contained a description of the land much more definite than the contract now in question, viz:

"Received of Thomas B. Florence forty dollars, to be accounted for in the settlement for the property at the corner

of Pennsylvania Avenue and 17th Street, now in his occupancy and sold to him. Washington, Jan. 1, 1857. Jas. Williams."

This court held the description insufficient, saying:

"Attempt is made to take the case out of the protection of the Statute of Frauds by the receipts given in evidence; but it is clear that they fall far short of what is required to accomplish that object. . . . Nor do the receipts contain anything of an unambiguous character to enable the court to determine what real estate is the subject of the purchase. . . . Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent."

The original memorandum in *Bayne v. Wiggins*, 139 U. S. 210, described the real estate involved therein as "a lot of 70 acres of land sold to them by D. B. Wiggins for \$10,000." Of the insufficiency of this description this court said:

"It may be admitted that the original memorandum of November 21st, signed by Bell in the presence and by the authority or assent of both parties, which stated a sale by Wiggins to the defendants of 'a lot of seventy acres of land,' and specified the terms of payment in cash and notes, was not of itself a sufficient memorandum to satisfy the statute of frauds, because it in no way described or gave any means of identifying the land sold."

Upon the first hearing of this case the Supreme Court correctly stated what we conceive to be the law, as follows:

"Parol evidence is admissible to *apply* the description, but not to *supply* it." (*Hampe v. Sage*, 82 Kan. 728, 733.)

The same doctrine is stated in *Halsell v. Renfro*, 14 Okl. 674, 78 Pac. 118, as follows:

"Where a sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given or where there is no description, such evidence is inadmissible. A court will never receive parol evidence both to *describe the land* and *apply the description*."

Notwithstanding this the trial court permitted Hampe to *supply* the missing description of the Oklahoma land by proving, over Sage's objections, the verbal listing of such lands for sale with certain real estate agents and the showing of the land to such agents and to the defendant in error. (Pp. 12, 13.) The facts in *Price v. Hays*, 144 Ky. 535, 139 S. W. 810, were most strikingly like those herein. The description in the contract therein was: "About 150 acres of land near Otter Creek station, one mile north of Rineyville, Hardin County, Ky., on I. C. R. R."

In passing upon the insufficiency of the description and the incompetency of parol evidence to supply it, the court said:

"Appellant alleged by an amended petition that appellee, at the time the contract was made, was the owner of only this 150 acres of land lying near Otter Creek station, one mile north of Rineyville, in Hardin county, Ky., and that he has owned no other since. The court sustained a demurrer to the original and amended petitions, upon the ground, as stated, that the writing did not contain a sufficient description of the land to legally bind appellee to perform the contract.

"Writings containing similar descriptions of land have been before this court repeatedly for construction. The object of the statutes of frauds and perjuries is to prevent the evil arising from parol testimony in so far as certain subjects were concerned, particularly that of land. The evidence as to what lands are the subject of the contract must be contained *within the contract*. The writing or memorandum must *itself* afford the means of identification; and unless it does, it is within the statute of frauds. . . . The appellee does not refer to the land as his, or as his home place. He

simply agrees to convey about 150 acres of land near Otter Creek station. No words are used in the writing to give a starting point, nor is the description sufficient to authorize parol proof to aid in identifying the land. It is true appellant stated in an amended petition that appellee owned only one tract of land near the place named; but this idea is not gotten from the writing. There was nothing therein to indicate this fact, or that he owned no other land in that vicinity. . . . The lower court did not err in sustaining the demurrer to both the original and amended petitions."

The closing paragraph of the foregoing clearly states why Hampe could not cure the want of sufficient description in the contract by so amending his petition as to allege that Sage owned no other Oklahoma lands at the date of the contract, viz:

This idea is not gotten from the writing. There was nothing therein to indicate this fact, or that he owned no other land in that vicinity.

The memorandum sued on in *Schreck v. Moyse*, 95 Miss. 48 So. 513, reads as follows:

"In consideration of \$50.00, I hereby give R. T. Schreck a fifteen day option on 22,000 acres of timber land in Franklin and Jefferson counties, Mississippi, at \$12.50 per acre.

J. L. MOYSE.

9-23-07.

Attest: S. D. WILKINSON.

In that, as in the case at bar, the plaintiff undertook to supply the deficiencies in the memorandum by alleging what land was intended. The court said:

"The declaration contains three counts, and states substantially that this option was given by appellee, and that it was understood verbally between the parties that certain named tracts of land were referred to, one lying in Franklin and the other in Jefferson counties, . . . that appellee did not own the lands at the time the option contract was signed,

and had either failed or refused to secure the same; that there was a failure to deliver the lands, . . . and that by losing the opportunity to make a re-sale appellant had been damaged to the extent of \$33,000; this being at the rate of \$1.50 per acre on 22,000 acres. To this declaration a demurrer was interposed, and sustained, on the ground that the option memorandum is void under the statute of frauds, since there is no sort of description of the property. It is obvious that the memorandum does not satisfy the statute, and equally obvious that parol testimony cannot be resorted to in order to supplement the deficiencies in the written memorandum."

Upon the trial the court permitted Hampe, over objections by Sage's counsel, to prove his case by evidence tending to show, (a) That some time previously Sage had shown one Hewins 760 acres in Pottawatomie county, Oklahoma, stating that he owned it and that it was all the land in Oklahoma he did own. (P. 13.) (b) Oral declarations by Sage to Hampe that he had reference in the agreement to the land he had shown to Hewins. (P. 13.) (c) That Sage at some other time, in some other transaction orally declared to Shilliglaw and Moffit, real estate agents, that he owned 760 acres in Pottawatomie county, Oklahoma; that it was all the land he owned in that State, and that he desired to sell it. (P. 12.) (d) That Shillinglaw and Moffit entered up such description as he gave, in a book they kept for listing lands, which entry was unsigned by Sage and contained no reference to the memorandum, nor the memorandum to it. (Pp. 12, 13.) The introduction of these entries upon the books of the real estate agents was clearly violative of the rule that lack of a sufficient description in a signed memorandum can not be supplied by an unsigned memorandum un-

less the former expressly refers to the latter. This rule is stated in the American note in Bennett's 6th Amer. Ed. of Benjamin on Sales at page 209, as follows:

"On the other hand, if only one paper be signed, no other unsigned paper can be considered unless it be *in some way* referred to in the signed paper; oral evidence alone to connect them will not suffice. The signed paper must incorporate and draw down into itself the unsigned one; otherwise there is no complete memorandum 'duly signed,' etc. *Moale v. Buchanan*, 11 Gill and J. 322; *Frank v. Miller*, 38 Md. 461. It is not enough that the *unsigned* paper, if unannexed to the signed one and not referred to in it, refers to the signed one; for an unsigned paper would be only like oral additions to the signed document, and all the evils would exist which the statute was designed to avoid. This distinction it is important to keep in mind."

The following language is used in the following authorities:

"Two or more papers properly connected may constitute a sufficient memorandum such, for instance, as a series of letters all showing that they relate to the same subject matter of the contract. In general if but one of the several papers is signed only such of the others as are referred to in it may be taken to constitute a part of the memorandum." (20 Cyc. 278.)

"The connection between the signed and the unsigned papers cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum." (*Johnson v. Buck*, 35 N. J. L. 338.)

Hampe's whole case rests on a flagrant disregard of this plain and well established rule of evidence. They supplemented the writing by Sage by the written memorandum contained in the real estate agent's books, and in order to do

so proved, by parol, that they both referred to the same property. There is not a word of reference in either the signed or the unsigned memorandum to the other. We respectfully submit that the memorandum entered on the books of the real estate agents, not signed by the party charged and purporting to be nothing more nor less than a record of what Sage said, was incompetent for any purpose. It was introduced and read to the jury over the strenuous objection of Sage's counsel. (Pp. 22, 23.) The error in receiving such proof was so material and prejudicial that it alone calls for a reversal of this case.

The decision of the Kansas courts on the sufficiency of the written contract supplemented by the allegations of the petition and the parol evidence introduced over the objections of the plaintiff-in-error is inextricably connected with the matter of the second paragraph of Sage's answer and can not be separated from the vice of the denial of the effect of the Federal Statute which permeates the entire decision.

The overruling of the objections of the plaintiff in error to the parol evidence offered by defendant-in-error involves a denial of the effect of Federal Statute pleaded in that second paragraph of the answer, the error in which is here assigned by the VIII Assignment of Error (Transcript p. 67.)

The written contract described no land sufficiently to identify it without supplementary proof.

The supplementary proof was justified only under the allegations of Hampe's second amended petition that certain described land was the land referred to in the contract and

that "said land was the only land in Pottawatomie County, Oklahoma, which defendant (plaintiff-in-error) then owned or claimed to own or have dominion over or control of or in which he had or claimed to have any interest." This allegation stood as modified by the admission in the subsequent pleadings of the execution and legal effect of the trust patents.

Walker v. Fleming, 37 Kan. 171, 177, 178.

"Appellee's (defendant-in-error) reply was an unverified general denial." (Transcript of Record pp. 12, 30.)

By these premises, the Act of Congress recited in the trust patents, excluded the lands described in such from the category of lands capable of sale by such a written contract and the objection of the plaintiff in error to each question and statement of the witnesses, Shillinglaw, Moffitt, and Hewins, and of defendant in error, (pp. 12, 13) concerning the land described in said trust patents which was the same as that described in the petition, raised the question of the competency of such testimony under and in view of the Act of Congress involved, and the rulings and decisions on such objections and upon the sufficiency of the proof of the contract under the Kansas Statute of Frauds, including, as it did, such objected conversations and statements as material elements, involved a denial of the effect of the Federal Statute referred to.

The proposition that a person may contract to sell and convey lands of which he is not the owner and may become liable for damages for the breach of such contract, mentioned by

the Kansas Supreme Court (p. 31) can not be reached without crossing the bridge over this Act of Congress, because the oral testimony must be received, and effect given to it over the objection of plaintiff-in-error before it can be said that this is a cause where the plaintiff in error has contracted to sell and convey lands of which he is not the owner. It is this objectionable evidence which supplies all description of any land whatever.

If the written contract had contained the description of this land, then the proposition might be applicable, though the invalidity of the contract, under the precise terms of the Act of Congress would then be clearly apparent.

The proposition is only sound when understood as subject to the qualification and exception that it does not apply to suits on contracts which the Federal Statute declares to be absolutely null and void. In this case, the Abstract of the Record makes it clear that the description was supplied by the oral testimony, viz:

"The plaintiff offered no evidence and no evidence was introduced by either party beyond the statements and representations contained in the above conversations, establishing or tending to establish that the defendant owned, controlled or had any interest in any of the lands described in the petition as situated in Pottawatomie County, Oklahoma. The plaintiff introduced no evidence and no evidence was introduced by either party concerning the conversation or transaction had at the time of the execution of the written agreement "Exhibit A" of the petition, nor of the land intended to be referred to by the words in that agreement, nor that land then referred to by the words used in that agreement was the land referred to in the earlier conversations and examined by Hewins and Hampe." Pp. 13, 14.)

From these statements and acts, two weeks before the contract was executed, objected to at the time by the plaintiff-in-error, it was determined by the court and jury that the written agreement related to land which under the Act of Congress could not be the subject of such a contract. In other words by incompetent evidence the court allowed a contract to be established which the statute said should be absolutely null and void, and then held plaintiff-in-error was liable for damages for refusing to convey the land which he had not described but which if he had described would have been a "contract touching the land," which would be absolutely null and void.

Proof of the statement of the plaintiff-in-error, either to Shillinglaw, Moffit, Hewins or to Hampe that he owned Indian allotted land which was not subject of sale, of which "any contract touching" the same was by Federal Statute declared to be absolutely null and void, cannot be used to establish that he referred to such land by the words used in a written agreement to sell land not described, and the denial of the proper effect of the Federal Statute in question occurred when the Kansas Court allowed such statements in evidence to supply a description necessary to satisfy the Kansas Statute of Frauds.

For further authorities upon this and other questions herein discussed we refer to the argument contained in our petition for a rehearing in the State Supreme Court, which appears at pages 36 to 58 of the transcript.

We respectfully submit that the decision of the Kansas Supreme Court should be reversed.

EDWIN A. AUSTIN,

LEE MONROE,

W. S. ROARK,

CARR W. TAYLOR,

Attorneys for Plaintiff-in-Error.

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No. 82

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1913.

ABRAHAM SAGE, Plaintiff in Error,

vs.
GEORGE HAMPE.

ON WRIT OF HABEAS CORPUS TO REMOVE FROM STATE OF CALIFORNIA.

Brief and Argument of Plaintiff in Error
Filed Under To Dismiss.

EDWIN A. AUSTIN,
LEE MONROE,
W. E. BOARK,
CARR V. TAYLOR,

Attorneys for Plaintiff in Error.

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(23,472)

IN THE

SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM, 1913.

No. 405.

AARON SAGE, *Plaintiff in Error*,

vs.

GEORGE HAMPE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

**Brief and Argument of Plaintiff In Error
Upon Motion To Dismiss.**

STATEMENT.

We were recently advised by the Clerk that this case would probably be reached in its regular order upon its merits in November. It seems to us unnecessary that it be twice heard within so short a time. We therefore suggest the propriety of deferring consideration of the motion to dismiss until the case is presented upon its merits. If the court does

not favor our suggestion we have this to say upon the merits of the motion:

This action was brought in the Shawnee County District Court to recover damages for an alleged breach of a written contract made in August, 1907, whereby Sage agreed to convey to Hampe "760 acre of land in Pottawatomie County, Oklahoma." (Transcript of Record, p. 8.) Sage defended on several grounds, one being that the Oklahoma lands were allotted in September, 1891, under the provisions of the General Indian Allotment Act of February 8, 1887, to six different members of the Citizen Pottawatomie Tribe of Indians in tracts of from 80 to 160 acres each, that under the provisions of said Act any conveyance or contract made touching the said lands before the expiration of 25 years from the date of their allotment was void and that said 25 year period "had not expired and had not been abrogated at the date of the alleged contract." (P. 9.) Upon the trial the District Court refused to receive evidence in support of this defense, holding that Sage was liable regardless of whether the lands were subject to sale or not. (Pp. 15, 16.)

Upon appeal, the Kansas Supreme Court affirmed the decision of the trial court, holding that Sage's claim of immunity from liability under the provisions of the Indian Allotment Act, even if all the facts alleged were proven, was insufficient to relieve him of liability. The syllabus by the court contains this statement:

"The fact that the lands described in the memorandum were Indian lands held in trust for the allottees, who were members of the tribe of Pottawatomie Indians, and that un-

der an act of Congress and the terms of the trust patents issued for said lands, any conveyance or contract with reference thereto is declared to be absolutely null and void, will furnish no defense to an action for damages for breach of a contract by the defendant to sell and convey such lands." (P. 28.)

ARGUMENT.

Regardless of whether his defense was good or bad Sage "claimed immunity" from liability upon the contract under the Act of Congress above referred to, which brings the case squarely within the purview of Section 709 R. S., now Section 237 of the Judicial Code. It is clearly within the rule announced by this court in *Nutt v. Knutt*, 200 U. S. 12, as follows:

"A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Section 709, to assert a right and immunity under such statutes."

The above language has since been quoted and approved in:

Ill. Central Rld. Co. v. McKendree, 208 U. S. 514, 525.

Eau Claire Nat. Bank v. Jackman, 204 U. S. 522, 532.

In *Strauss v. Am. Publishers Ass'n*, 231 U. S. 222, 233, this court said:

"One who sets up a Federal Statute as giving immunity from a judgment against him, which claim is denied by the decision of a state court, may bring the case here for review under Sec. 709 of the Revised Statutes, now Sec. 237 of the Judicial Code."

Opposing counsel say in their argument that: "The

judgment of the Kansas Court was based upon grounds independent of that statute", hence, they say, "no claim of . . . immunity under the . . . laws of the United States was decided against the plaintiff in error." This statement is incorrect. What each of the State courts actually did was to hold squarely that Sage's claim of immunity from liability because of the effect of the Indian Allotment Act constituted no defense to Hampe's claim for damages under the contract which Sage alleged was void by reason of the Act of Congress. This defense of the plaintiff in error, which the State courts decided against him, as clearly presents a Federal question as did that of the defendant in *Anderson v. Corkins*, 135 U. S. 483, 486, who defended a suit upon a contract to convey government land made prior to final entry under the Homestead law upon the ground that the contract was void under such law. This court in holding that such a defense brought the case within the scope of Sec. 709 R. S., said:

"Notwithstanding this defense so expressly stated a decree for specific performance was entered against them. Obviously, this could not be so entered without adjudging such defense insufficient, and denying to them the protection claimed under the homestead laws. . . . Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the homestead laws, and as the supreme court of Nebraska expressly declared that this validity under the homestead laws was not sustainable, it follows that the case is one in which a right was specifically set up and claimed under the statutes of the United States, and the decision and judgment of the state court were against that right. Hence the jurisdiction of this court cannot be doubted."

In *Monson v. Simonson*, 231 U. S. 342, the defendant

claimed that a deed to certain allotted Indian lands was void because of the restrictions of the Allotment Act. This court held that such plea presented a Federal question, saying:

"The Federal question presented for decision by us is, whether the restrictions upon alienation imposed upon the allottee by Sec. 5 of the act of 1887 were instantly removed by the act of March 3, 1905, or remained in force until the issuing of the patent carrying the full and unrestricted title. The defendant sought to maintain the latter view, but the court sustained the other."

In *Logan Co. Nat. Bank v. Townsend*, 139 U. S. 67, 73, a National Bank was sued for debt upon a contract. It defended upon the ground that the contract was void because of certain provisions of the National Banking Act. In holding that it had jurisdiction to review a judgment therein against the bank this court said:

"The exemption or immunity thus specially set up in the court of original jurisdiction, and reasserted in the court of appeals of Kentucky, having been denied by the judgment, the authority of this court to re-examine that judgment, so far as it determines that no such exemption or immunity as that claimed by the bank, under the act of Congress, exists, is entirely clear."

Upon this question we cite the following other decisions of this court:

McNulta v. Lockridge, 141 U. S. 327, 331.

McCormick v. Market Bank, 165 U. S. 538, 546.

Hammond v. Whittredge, 204 U. S. 538, 547.

St. Louis & Iron Mountain Ry. Co. v. Taylor, 210 U. S. 281, 293.

Kansas City So. Ry. v. Albers Com. Co., 223 U. S. 573, 591.

We have further argued this question at pages 20 to 23

of our brief upon the merits of this case now on file therein to which attention of this court is directed if further argument be necessary.

Much of the argument of opposing counsel upon their motion to dismiss, notably that which claims a subsequent removal of the restrictions contained in the original Allotment Act, are properly upon the merits of the case and are discussed at pages 34 to 39 of our above mentioned brief.

We respectfully submit that the motion to dismiss is without merit and should be denied.

EDWIN A. AUSTIN,

LEE MONROE,

W. S. ROARK,

CARR W. TAYLOR,

Attorneys for Plaintiff in Error.

82

Supreme Court, U. S.

FILED

AUG 26 1914

JAMES O. MAHER

CLERK

IN THE

Supreme Court of the
United States,

OCTOBER TERM, 1914

No. 82

AARON SAGE, PLAINTIFF IN ERROR,

V.

GEORGE HAMPE, DEFENDANT IN ERROR.

MOTION TO DISMISS AND BRIEF AND ARGUMENT OF
DEFENDANT IN ERROR THEREON.

J. B. LARIMER,

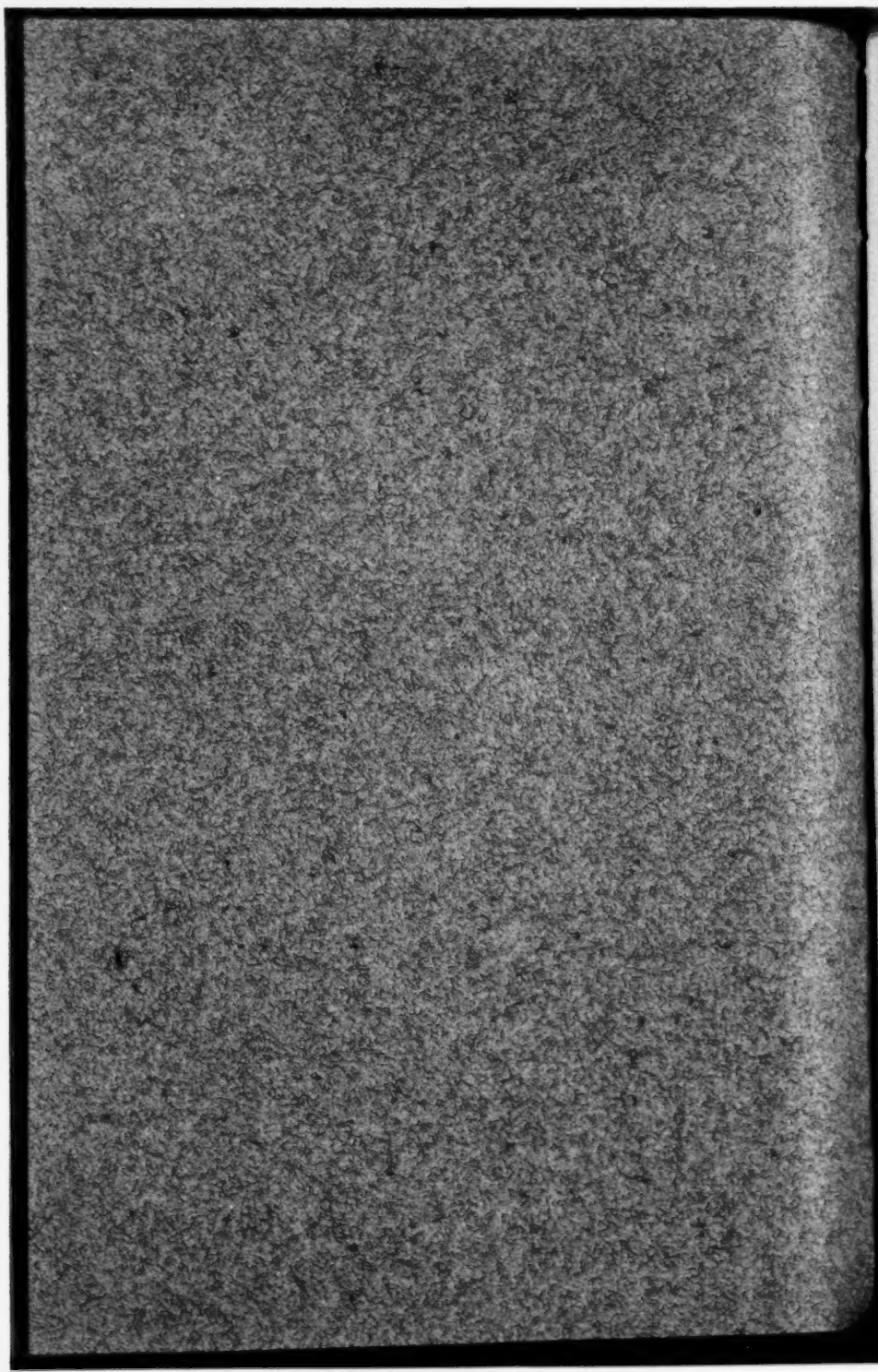
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J. E. ADDINGTON,

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W. H. THOMPSON,

Of Counsel.



IN THE

**Supreme Court of the
United States,**

OCTOBER TERM, 1913.

No. 405.

AARON SAGE, PLAINTIFF IN ERROR,

V.

GEORGE HAMPE, DEFENDANT IN ERROR.

**MOTION TO DISMISS AND BRIEF AND ARGUMENT OF
DEFENDANT IN ERROR THEREON.**

MOTION TO DISMISS.

Comes now George Hampe, defendant in error, and respectfully states to the court that the plaintiff in error in this cause seeks by writ of error to have this court review and reverse the judgment of the Supreme Court of Kansas, affirming a judgment of the District Court of Shawnee County, against the plaintiff in error and in favor of the defendant in error in the sum of \$2647.66 (Twenty Six Hundred and forty seven dollars and sixty-six cents) and costs.

On the 20th day of August, 1907, Aaron Sage, the plaintiff in error herein, entered into a written contract with

George Hampe, the defendant in error, for the exchange of real estate, the plaintiff in error agreeing to convey to the defendant in error seven hundred and sixty acres of land in Oklahoma and the defendant in error agreeing to convey to the plaintiff in error eighty-one and one-half acres of land in Kansas. The agreement further contained stipulations as to the value at which the lands were to be exchanged and the settlement of differences. (Transcript of record, page 8.)

Sage breached the contract and upon his refusal to carry it out Hampe sued him for damages. The case was tried in the District Court and judgment rendered in favor of Hampe after which it was appealed to the Supreme Court and there the judgment of the lower court was reversed. On this hearing in the Supreme Court the only question considered by the Supreme Court was the sufficiency of the written contract and the evidence in support thereof and upon this question the judgment of the lower court was reversed. *Hampe v. Sage*, 82 Kansas, 728.

Following the law as defined in this case by the Supreme Court Hampe amended his petition in the lower court, issues were joined upon it and the case was again tried and the judgment herein complained of rendered. In the answer of the defendant it was claimed that the written contract upon which the suit was brought was not in fact a contract and further that it did not contain sufficient description of the Oklahoma land to comply with the Statute of Frauds of the State of Kansas and further that the Oklahoma land referred to was Indian land allotted and patented to mem-

bers of the tribe of Pottawatomie Indians and not to Sage who is the plaintiff in error herein. The trial court held that the written instrument sued upon was a contract; and that the allegations of the petition and the proofs submitted at the trial were sufficient to sustain the contract against the charge that it was in violation of the Statute of Frauds; and that it was immaterial whether the Oklahoma land had been allotted to members of the Pottawatomie tribe of Indians and not to Aaron Sage as alleged in the answer of the defendant.

The Supreme Court of Kansas affirmed the judgment of the trial court and expressly pointed out that its decision was based upon the liability of a contracting party to respond in damages for failure to comply with a contract to sell land regardless of whether he was then the owner of the land. Aaron Sage was not an Indian and was not claiming the rights of an Indian and the court held that the question of whether a contract to sell the particular lands was a valid contract was not necessary to a judgment upon his liability in damages and to the determination of the cause before it. Pages 29 to 34 of the printed transcript of record in this cause.

And thereupon the defendant in error moves that the court make an order dismissing the writ of error herein upon the grounds and for the reasons following, to wit:

First. This court has no jurisdiction of the subject matter of said action or of any question presented by the records herein.

Second. No claim of title, right, privilege or immunity under the Constitution of the United States or any of the

treaties or laws of the United States was decided by the Supreme Court of Kansas against the plaintiff in error.

J. B. LARIMER,

A. M. HARVEY,

J. E. ADDINGTON,

Attorneys for defendant in error.

W. H. THOMPSON,

Of Counsel.

BRIEF AND ARGUMENT.

No Federal Question is Presented by the Record in This Case.

The plaintiff in error claims that the validity and application of a statute of the United States, being an act of Congress concerning lands allotted to Pottawatomie Indians approved February 8th, 1887, was drawn in question by the decision of the Supreme Court of Kansas in this case and that the decision was against the validity and application of said statute as pleaded and relied upon by the plaintiff in error. This is the sole contention on account of which plaintiff in error claims that this court has jurisdiction.

An examination of the issues as shown by the pleadings and an examination of the opinion of the Supreme Court of Kansas show that a decision as to the validity and application of the federal statute referred to was not necessary to a determination of the cause, and that the judgment of the Kansas court was based upon grounds independent

of that statute. The pleadings setting forth the issues are found at pages 6 to 12 of the transcript of record and the opinion of the court is found at pages 28 to 34 of the transcript of the record. We call special attention to that part of the opinion found on page 33 as follows:

"We do not rest our decision, however, upon the effect of the acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for damages for the breach of his contract to sell and convey the lands in question although he may have had no present interest therein and no means of compelling a conveyance at the time he entered into the contract."

We further call attention to the cases cited on page 31 of the transcript of record showing that it has been the consistent rule in the Kansas courts that a person may contract to sell and convey land of which he is not the owner and may become liable for the breach of such contract.

The Supreme Court of Kansas does point out the fact that the pleading and offer of proof by Sage were not sufficient to show that the contract was void, even if a consideration of the statutes concerning Indian lands was necessary. The statutes of 1894 (28 U. S. Statutes at Large, p. 295) and 1900 (31 U. S. Stat. at Large, p. 247) referred to in the opinion provided that Indian lands of the character referred to may be sold before the end of the twenty-five year period and the testimony at the trial, a part of which is shown on page 15 of the transcript of record shows that the very lands in question here were in fact sold shortly after the trade was made with Hampe and long before the twenty-five year period had expired. Notwithstanding these

subsequent statutes of 1894 and 1900 and notwithstanding the showing that the land in question was subject to sale the Supreme Court of Kansas preferred to rest its decision upon the rule indicated in the quotation from the opinion here made.

"It is axiomatic that in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been presented." *California Powder Works v. Davis*, 151 U. S. 389, 393.

Eustis v. Bolles, 150 U. S. 361.

Gillies v. Stinchfield, 159 U. S. 658.

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

Seneca Nations v. Christy, 162 U. S. 283.

Dibble v. Bellingham Bay L. Co., 163 U. S. 63.

Harrison v. Morton, 171 U. S. 38.

Pierce v. Somerset, 171 U. S. 641.

McQuade v. Trenton, 172 U. S. 636.

Seeberger v. McCormick, 175 U. S. 274.

Seaboard Air Line Ry. v. Duvall, 225 U. S. 477.

We respectfully submit that the foregoing cases are exactly in point and decisive against the jurisdiction of this

court, and that the writ of error herein should be dismissed.

J. B. LARIMER,

A. M. HARVEY,

J. E. ADDINGTON,

Attorneys for defendant in error.

W. H. THOMPSON,

Of Counsel.



(23,472.)

United States

FILE

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JAMES

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 82

AARON SAGE, PLAINTIFF IN ERROR,
VS.
GEORGE HAMPE.

In error to the Supreme Court of the State of Kansas.

STATEMENT, BRIEF AND ARGUMENT BY
DEFENDANT IN ERROR.

J. B. LARIMER,

A. M. HARVEY,

J. E. ADDINGTON,

Attorneys for George Hampe,
Defendant in error.

W. H. THOMPSON,
Of Counsel.

(23,472.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 405.

AARON SAGE, PLAINTIFF IN ERROR,
VS.
GEORGE HAMPE.

In error to the Supreme Court of the State of Kansas.

**STATEMENT, BRIEF AND ARGUMENT BY
DEFENDANT IN ERROR.**

STATEMENT.

The defendant in error has filed his motion to dismiss this appeal, and his brief in support thereof, which motion we believe, under the uniform rulings of this court, should be sustained. However, as the Court may desire to have the case submitted on the merits, together with the motion

to dismiss, we desire to make the following brief statement. We call the special attention of the Court to the statements of the case and the two opinions rendered by the Supreme Court of the State of Kansas, the first of which is *Hampe v. Sage*, 82 Kan. 728, 109 Pac. 408, and the second of which, being the one from which this appeal is attempted to be taken, is *Hampe v. Sage*, 87 Kan. 536. (Transcript of record, 28-34.) In our statement in the motion to dismiss this appeal we pointed out that this land had in fact been sold before the trial of the case. The plaintiff in error contends that the statement "For that is what it was sold for," should not be considered, for the reason that it was by the trial court, upon objection being made, stricken out, as not being responsive to the question. (Transcript of record page 15.) The court will observe, however, that this statement was made voluntarily by the plaintiff in error, and was a declaration or admission on his part that the land had in fact been sold, and whether competent as evidence or not, must be considered as a voluntary declaration or admission on his part. We think this statement shows, for the purposes of the hearing by this court, that this land was, if Indian land, within the exceptions of the acts of Congress concerning such lands, and therefore subject to sale, and hence that the plaintiff in error is precluded from now claiming that the land was not subject to sale.

That the court may now have before it in this connection the statutes providing that these Indian lands could be lawfully sold at the time this transaction occurred, we here refer to and cite such statutes:

"That any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma, to whom a trust patent has been issued under the provisions of the Act approved February eight, eighteen hundred and eighty-seven (Twenty-fourth Statutes, three hundred and eighty-eight) and being over twenty-one years of age, may sell and convey any portion of the land covered by such patent in excess of eighty acres, the deed of conveyance to be subject to approval by the Secretary of the Interior under such rules and regulations as he may prescribe, and that any Citizen Pottawatomie not residing upon his allotment, but being a legal resident of another state or territory, may in like manner sell and convey all the land covered by said patent, and that upon the approval of such deed by the Secretary of the Interior the title to the land thereby conveyed shall vest in the grantee therein named."

28 U. S. Stat. at Large, 286.

"That the proviso to the Act approved August fifteenth, eighteen hundred and ninety-four, permitting the sale of allotted lands by members of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians of Oklahoma is hereby extended so as to permit the adult heirs of a deceased allottee to sell and convey the lands inherited from such decedent; and if there be both adult and minor owners of such inherited lands, then such minors may join in a sale thereof by a guardian, duly appointed by the proper court, upon an order of such court made upon petition filed by such guardian, all conveyances made under this provision to be subject to the approval of the Secretary of the Interior: and any Citizen Pottawatomie or Absentee Shawnee not residing upon his allotment, but being an actual resident of another State or Territory, may in like manner sell and convey all the land allotted to him."

31 U. S. Stat. at Large, 247.

The Supreme Court of Kansas commenting on the above statutes, used the following language:

"It is apparent from these subsequent statutes that the Citizen Pottawatomie Indians were given the right under certain conditions to dispose of their lands: and while the subsequent acts of congress do not in terms abrogate the inhibition against the validity of contracts for the sale of such lands declared in the act of 1887, it seems obvious that when the allottee was permitted to sell his lands, any contract made by others in relation thereto would not be void. There was no allegation in the answer nor any proof offered that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later acts of congress."

We also desire to call special attention to the opinion of the Supreme Court of Kansas at page number 33 of the transcript of record, wherein it is said:

"We do not rest our decision, however, upon the effect of the acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for damages for the breach of his contract to sell and convey the lands in question although he may have had no present interest therein and no means of compelling a conveyance at the time he entered into the contract."

And also to this opinion as a whole.

This decision of the Supreme Court of Kansas is supported by numerous prior decisions by that court, and the rule of law in that state has been well settled for many years in accordance with the statement above quoted from the opinion.

The Supreme Court of Kansas upon the first hearing of this case in that Court did not hold, as stated on page 5 of brief for plaintiff in error, that the contract was insufficient within the statute of fraud. The ruling of the court

was that "the statute of fraud renders demurrable a *petition* declaring upon" the contract without the amendment that was made to the petition before the second trial. *Hampe v. Sage*, 82 Kan. 728; 87 Kan. 536.

POINTS AND AUTHORITIES.

I.

The plaintiff in error cannot maintain this appeal for the reason that this Court is without jurisdiction to consider or determine the questions sought to be raised by him on such appeal, and no Federal question is presented by the transcript of the record for the consideration of this Court. An examination of the issues as shown by the pleadings, and of the opinion of the Supreme Court of Kansas, shows conclusively that a decision as to the validity and application of the Federal statute sought to be invoked was not necessary to a determination of the cause.

California Powder Works v. Davis, 151 U. S. 389, 393.

Schuyler Bank v. Bollong, 150 U. S. 85-88.

Eustis v. Bolles, 150 U. S. 361.

Gillis v. Stinchfield, 159 U. S. 658.

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.

Seneca Nations v. Christy, 162 U. S. 283.

Dibble v. Bellingham Bay L. Co., 163 U. S. 63.

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McQuade v. Trenton, 172 U. S. 636.

Seeberger v. McCormick, 175 U. S. 274.

Seaboard Air Line Ry. v. Duvall, 225 U. S. 477.

II.

The opinion of the Supreme Court of Kansas shows that the judgment appealed from was expressly rendered upon considerations other than of the Federal statutes sought to be invoked as the basis for this appeal.

Hampe v. Sage, 87 Kan. 536, 543.

Trust Co. v. McIntosh, 68 Kan. 452-462.

Maddux v. Simonson, 83 Kan. 325-327.

Krhut v. Phares, 80 Kan. 515.

Robertson v. Talley, 84 Kan. 817-820.

29 A. and E. Encyc. of Law (2nd ed.) 667.

III.

It appearing from the record by the admission and declaration of the plaintiff in error that this land had been sold prior to the expiration of 25 years from the date of the allotment, it must be conclusively presumed that the restrictions had been removed, as provided by the Acts of Congress.

Hampe v. Sage, 87 Kan. 536-543.

28 U. S. Stat. at Large, 286, 295; 1 Kapp L. and T. 520.

Indian Land Laws, Sec. 184, p. 239.

31 U. S. Stat. at Large, 221-248; 1 Kapp L. and T. 701.

Bledsoe on Indian Laws, Sec. 164, p. 240.

IV.

Under the issues raised by the answer of the defendant there was no allegation in the answer, nor any proof offered, that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later Acts of Congress, and such objection was not entertained by the Supreme Court of Kansas, and cannot now be entertained in this Court.

Hampe v. Sage, 87 Kan. 536-543.

Gen. Stat. of Kansas, 1909, par. 5724.

4 Wigmore on Evidence par. 2573.

Oliver v. State, 4 L. R. A. 39, note.

State v. Herold, 9 Kan. 194, 201.

16 Cyc. 889.

V.

The sufficiency of the terms of the contract as to the description of the lands therein referred to, presents a question of general commercial law which has been finally and conclusively determined by the judgment of the Supreme Court of Kansas in numerous decisions, and such question is not open for consideration by this Court.

Hampe v. Sage, 82 Kan. 728.

Hampe v. Sage, 87 Kan. 536.

Bacon v. Leslie, 50 Kan. 494; 31 Pac. 1066.

Cummins v. Riordon, 84 Kan. 791, 795.

This is the general rule.

20 Cyc. 271.

36 Cyc. 593-595.

29 A. and E. Encyc. of Law, 866.

Hurley v. Brown, 98 Mass. 545, 547, 548.

Waring v. Ayres, 40 N. Y. 357.

White v. Breen, 106 Ala. 159.

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Flegel v. Dowling, (Or. 1909), 102 Pac. Rep. 178.

VI.

It must be presumed that the contract was legal.

Craft v. Bent, 8 Kan. 328, 332.

McBratney v. Chandler, 22 Kan. 692, 695.

VII.

The plaintiff in error did not offer proof sufficient to establish a defense under the Acts of Congress and Aaron Sage, the plaintiff in error, is not an Indian, and even if the lands in question were not subject to sale, which was not shown, and is not a fact, he is liable to the defendant in error.

9 Cyc. 551-554-570.

16 Cyc. 889.

Wigmore on Evidence, Vol. 4, par. 2573.

Note to case of *Oliver v. State of Alabama*, 4 L. R. A. page 33, 39.

ARGUMENT.

I.

The plaintiff in error claims that the validity and application of a statute of the United States, being an act of Congress concerning lands allotted to Pottawatomie Indians approved February 8th, 1887, was drawn in question by the decision of the Supreme Court of Kansas in this case and that the decision was against the validity and application of said statute as pleaded and relied upon by the plaintiff in error. This is the sole contention on account of which plaintiff in error claims that this court has jurisdiction.

An examination of the issues as shown by the pleadings,

and an examination of the opinion of the Supreme Court of Kansas, show, that a decision as to the validity and application of the federal statute referred to was not necessary to a determination of the cause, and that the judgment of the Kansas court was based upon grounds independent of that statute. The pleadings setting forth the issues are found at pages 6 to 12 of the transcript of record and the opinion of the court is found at pages 28 to 34 of the transcript of the record. We call special attention to that part of the opinion found on page 33 as follows:

“We do not rest our decision, however, upon the effect of the acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for damages for the breach of his contract to sell and convey the lands in question although he may have had no present interest therein and no means of compelling a conveyance at the time he entered into the contract.”

We further call attention to the cases cited on page 31 of the transcript of record showing that it has been the consistent rule in the Kansas courts that a person may contract to sell and convey land of which he is not the owner and may become liable for the breach of such contract.

The Supreme Court of Kansas does point out the fact that the pleading and offer of proof by Sage were not sufficient to show that the contract was void, even if a consideration of the statutes concerning Indian lands was necessary. The statutes of 1894 (28 U. S. Statutes at Large, p. 295) and 1900 (31 U. S. Stat. at Large, p. 247) referred to in the opinion provided that Indian lands of the character referred to may be sold before the end of the twenty-five

year period and the testimony at the trial, a part of which is shown on page 15 of the transcript of record shows that the very lands in question here were in fact sold shortly after the trade was made with Hampe and long before the twenty-five year period had expired. Notwithstanding these subsequent statutes of 1894 and 1900, and notwithstanding the showing that the land in question was subject to sale, the Supreme Court of Kansas preferred to rest its decision upon the rule indicated in the quotation from the opinion here made.

"It is axiomatic that in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been presented." *California Powder Works v. Davis*, 151 U. S. 389, 393.

II.

The Supreme Court of the State of Kansas having expressly based its decision and opinion upon consideration other than the Acts of Congress, now sought to be invoked, by the plaintiff in error the Federal statutes are not applicable. In the opinion of the Supreme Court of the State

of Kansas it is expressly ruled in the syllabus which under the facts in that State is made the law of the case:

"The fact that the lands described in the memorandum were Indian lands held in trust for the allottees, who were members of the tribe of Pottawatomie Indians, and that under an Act of Congress and the terms of the trust patent issued for said lands, any conveyance or contract with reference thereto is declared to be absolutely null and void, will furnish no defense to an action for damages for breach of a contract by the defendant to sell and convey such lands." (Transcript of record, pages 28, 29.)

In the opinion after citing and quoting the Acts of Congress, the Court say:

"It is apparent from these subsequent statutes that the Citizen Pottawatomie Indians were given the right under certain conditions to dispose of their lands; and while the subsequent acts of congress do not in terms abrogate the inhibition against the validity of contracts for the sale of such lands declared in the act of 1887, it seems obvious that when the allottee was permitted to sell his land, any contract made by others in relation thereto would not be void. There was no allegation in the answer nor any proof offered that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later acts of congress. We do not rest our decision, however, upon the effect of the acts of 1894 and 1900. Under the authorities cited, *supra*, we hold that the defendant is liable in an action for damages for the breach of his contract to sell and convey the land in question although he may have had no present interest therein and no means of compelling a conveyance at the time he entered into th contract." (Transcript of record, page 33.)

The authorities referred to in the above extracts from the opinion of the court are as follows:

Trust Co. v. McIntosh, 68 Kan. 452, 462, 75 Pac. 498.

Krhut v. Phares, 80 Kan. 515. 103 Pac. 117.

Robertson v. Talley, 84 Kan. 817, 820, 115 Pac. 640.

The syllabus from the case last cited which was quoted by the Supreme Court of Kansas reads as follows:

"One may bind himself personally by an agreement to furnish a deed to land owned by another, even when he had no present interest therein, and no means of compelling a conveyance." (Transcript of record p. 32.)

It being the rule of law well settled by the Supreme Court of the State of Kansas that the plaintiff in error need have no interest whatever in the land contracted to be conveyed, and no means of compelling a conveyance of such land in order to render himself liable in an action for damages, it would seem to us, as it did to the Supreme Court of Kansas, entirely clear that it is wholly immaterial what the reason was, if there was any reason, why he could not make or compel such conveyance. This is not an action for specific performance but is an action for damages, for breach of a contract, which under the decision of the Supreme Court of Kansas is binding, and it was no defense under such ruling for the plaintiff in error that these were lands to which he had no title nor means of compelling a conveyance. It was not sought to compel a conveyance of the title but the action was brought solely for damages for breach of contract, which contract as construed by the Supreme Court of Kansas was legal and binding in this regard upon the plaintiff in error.

III.

The plaintiff in error while a witness on the stand in his own behalf volunteered the statement which was not responsive to the question propounded to him that this land had been sold prior to the trial of the case. We must assume that this statement was true, though voluntarily made, and, although not properly evidence, is binding as being an admission or declaration against interest, and especially because made in the presence of the defendant in error. Therefore, we have the direct statement, under oath, of the plaintiff in error that these lands were subject to sale because he said that they had been sold prior to the trial of the case, which was long before the expiration of the twenty-five years mentioned in the Acts of Congress. (Transcript of record, p. 15.)

Hence it must be conceded that these lands were within the exceptions of the Acts of Congress and, therefore, that such Acts did not apply in the consideration of the contract in suit, even though the same had been properly pleaded and competent proof had been offered to establish what is now claimed by the plaintiff in error.

IV.

The answer of the plaintiff in error contained no allegations, nor was there any proof offered by him in support

of the claim that the allottees had not acquired the right to dispose of these lands under the conditions and provisions of the later Acts of Congress. (Transcript of record, p. 9-11 inclusive, and p. 33.)

No issue having been tendered upon this proposition and it being incumbent upon the plaintiff in error to both allege and prove that he claimed these lands were not within the exceptions of the Acts of Congress, the defense now invoked in this Court must wholly fail. The presumption always is that a contract is legal and not illegal, and that the parties acted within the law and not outside of the law, when they enter into a contract. See authorities cited under point "IV" of this brief.

The answer of the plaintiff in error did not plead a defense. The reference in the answer made to the statute of 1887 simply alleged that of which the Court would take judicial notice. Such is the legal effect of the statement in the answer that "said period of twenty-five years from the date of said allotment and trust patent had not expired and had not been abrogated at the date of the alleged contract." This is mere surplussage and is the pleading of a conclusion of law.

Paragraph 5724 Gen. Stat. of Kan., 1909, then, and now, in force provides: "Neither presumptions of law nor matters of which judicial notice is taken need be stated in the pleading."

This rule is well established that the statutes of fraud may not be invoked for the purpose of perpetrating an injustice and a fraud.

36 Cyc. 593-595.

Howison v. Bartlett, 147 Ala. 408, 40 So. 757, and notes thereto.

V.

Whether or not a contract for the sale or conveyance of land are sufficiently definite in its description to render the same not obnoxious to the statute of fraud, is a rule of commercial law, and a rule governing the title to real estate, and, therefore, a rule of property, the decision of which by the Supreme Court of last resort of the State is conclusive and binding upon this Court. See the opinion of the Supreme Court of Kansas appealed from. (Transcript of record 28-34.), and particularly the first and second paragraphs of the syllabus which read as follows:

"*Hampe v. Sage*, 82 Kan. 728, 109 Pac. 408, followed and held that the amendment to the petition alleging that the land described in a memorandum which evidenced the contract between the parties was the only land in Pottawatomie County, Oklahoma, which the defendant owned or claimed to own, or have an interest in, was sufficient to satisfy the provision of the statute of frauds which requires contract for the conveyance of land to be in writing."

"Held, further, that evidence of statements and admissions of the defendant made shortly before the memorandum was executed, to the effect that he owned the land described therein and that he owned no other land in that county, was competent for the purpose of showing that in fact he owned and claimed to own no other tract of land in said county."

See, also, the numerous authorities herein cited under point "V".

In this connection we also call special attention to the following language in the opinion of the Supreme Court of Kansas:

"Under the authorities cited, a recital that Sage owned the land which he undertook to convey can be found in the contract itself, by a liberal interpretation of its terms. Proof that he owned no other land in that county would then render the description, as so interpreted, absolutely definite." *Hampe v. Sage*, 82 Kan. 733.

The defendant amended his petition by adding thereto the following allegation:

"Said tract of land was the only land in Pottawatomie County, Oklahoma, which said defendant owned or claimed to own, or have dominion over or control of, or in which he had or claimed to have any interest." (Transcript of record p. 6-7.)

The proof of the defendant in error supported the foregoing amendment to the petition, and the first paragraph of the syllabus of the Supreme Court of Kansas from which this appeal is sought to be taken states definitely that this amendment "was sufficient to satisfy the provision of the statute of frauds which requires contracts for the conveyance of lands to be in writing." (Transcript of record p. 28.)

In the corresponding portion of the opinion that Court held that the evidence of the defendant in error was sufficient to establish and prove the allegations of the amendment.

VI.

It must be presumed that the contract in suit was legal. In a very similar case Justice Brewer, then a member of the Supreme Court of the State of Kansas, and afterward a distinguished member of this Court, speaking for the Supreme Court of Kansas said:

"It is further insisted that the contract was void as in contravention of the laws of the United States; that the tract was a part of the public lands; that Craft could enter it only by making oath that no other person had any interest therein, and that he was not entering for the benefit of any other person. It is sufficient to say in reply to this that the petition does not disclose the status of the land, what steps if any Craft had already taken to perfect his title, or what interest he had in the land. We cannot presume anything in favor of the illegality of the transaction. We must consider it legal until facts are presented which compel us to hold it otherwise." *Craft v. Bent*, 8 Kan. 328, 332.

The following apt language is also found in *McBratney v. Chandler*, 22 Kan. 692, 695:

"There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having entered into, must make the fact of its illegality apparent. * * * *"

"The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is matter of defense."

Applying the foregoing rule in the case at bar every presumption is in favor of the legality of the contract in

suit. There having been no allegation in the answer, nor proof offered, that the Oklahoma lands described in the contract were not within the exceptions provided for by the Acts of Congress so that the same could be legally offered for sale and sold by the allottees at the time the contract was entered into, it must be conclusively presumed that such contract was legal, and that the lands were not within the prohibition of the Acts of Congress.

VII.

In his answer the plaintiff in error pleaded that the lands were patented to certain "members of the tribe of Pottawatomic Indians and not to this defendant." (Transcript of record p. 9.) It must be particularly noted that the contract in suit in no manner indicated or suggested that these lands were Indian lands, or if Indian lands that they were not subject to sale. It cannot be presumed for the purpose of defeating the contract rights of the defendant in error that he knew any more about the lands than the contract recited. The restrictions made in the power to contract are extraordinary and cannot be extended by inference to persons other than those named in the act. Under usual and ordinary circumstances Sage would be liable for any damages caused by his breach of a contract to sell land, even though he did not own the land. To permit him to defend his breach of the contract by the claim that the land he contracted to sell was land that did not belong to him but did

in fact belong to Indians, and that these Indians were wards of the Government, and as such wards were protected in their improvidence by a certain Federal statute, and that he was entitled to the same protection would certainly be a strange doctrine.

Hampe and Sage were not *in pari delicto*. Even if the land was not subject to sale, which we say was not shown, and is not a fact, Sage is liable to Hampe. 9 Cyc. 551 to 554.

The evidence shows without contradiction, and without any evidence being offered to the contrary, that all Hampe knew on the subject was the information received by him from Sage to the effect "that he and his family had 760 acres of land, part allotted and part deeded in Pottawatomie County they wanted to exchange for a smaller tract; that it was Indian land and that they did not have a patent to it, but he said he would get it." (Transcript of record p. 13.)

This information, considered with other representations made by Sage, entirely relieves Hampe from any charge that he was attempting to buy land which he knew it was unlawful for the parties to sell to him. If Sage made a contract which he knew was unlawful with Hampe, who was acting in good faith, believing that the contract was lawful, then Sage is liable in damages to Hampe for the value of the bargain Hampe would have had if the contract had been lawful. 9 Cyc. 570. This statement in no manner indicated what kind of "Indian Land" this was, not even the tribe, and Hampe cannot be presumed to have known that it was,

or might be claimed to be, land that was not subject to sale, and Sage said he would get the patent.

It must be remembered that the plaintiff in error is not an Indian, and does not claim to be a member of the Tribe of Pottawatomie Indians. The proof showed that plaintiff in error was at all times and at the trial, a citizen of Wau-bunsee County, Kansas, and also that Fred Sage, one of the patentees, was a citizen of the same county and state, and the fact is that all of the patentees were at the time of the making of the contract in suit residents of states other than Oklahoma. (Transcript of record pp. 14-19.)

We respectfully submit that if at all necessary for a proper determination of this case this Court would take judicial notice of the fact that the Secretary of Interior gave his consent that the Oklahoma land described in the contract might be sold and conveyed by the allottees thereof prior to the trial of this case.

In the event that this Court should entertain jurisdiction of this cause on the merits and overrule the motion of the defendant in error to dismiss, we contend that even if material error should be found in the record on the merits, that the only judgment that could be entered here would be one to remand the case to the Supreme Court of Kansas with directions for a new trial upon the question as to whether or not this land was subject to sale under the exceptions in the Acts of Congress concerning Indian lands, hereinbefore cited and quoted.

We respectfully submit that the motion to dismiss of the defendant in error should be sustained, and, if not, that

this appeal is without merit and the judgment and decision of the Supreme Court of the State of Kansas should be affirmed.

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